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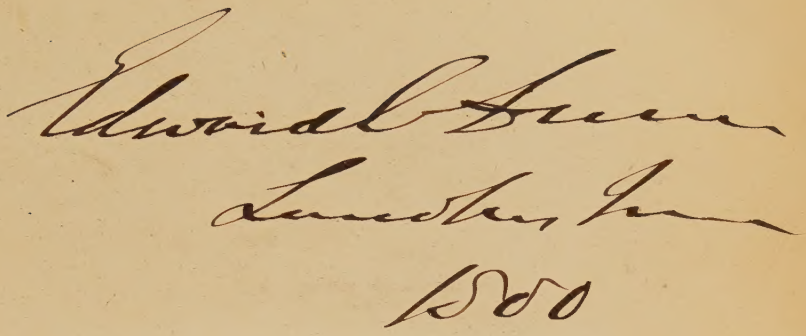

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BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE PRIVY COUNCIL.

REPORTED BY

CHARLES CLARK, Queen's Counsel;
JOHN FRASER MACQUEEN, Queen's Counsel;
HERBERT COWELL, Barrister-at-Law.

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ERRATA.

Page 322, line 8, *for* "*directio*" *read* "*delectus.*"

„ 618, lines 10 & 11, *for* "*Whitehouse*" *read* "*Whiteway.*"

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

JOSEPH FISHER . . . . . APPELLANT; H. L. (E.)

AND 1878

WILLIAM DIGBY SMITH . . . . . RESPONDENT. *Nov.* 14.

Policy on Ship—Broker's Lien on.

The lien of a broker upon policies of insurance which he has effected, and on which he has paid the premiums, may be superseded by a special arrangement or contract, or by his particular mode of dealing with the parties for whom he has effected them. But where he has merely agreed to state monthly accounts and to receive monthly payments, but has never delivered up the policies until after actual payment made to him, his general right of lien is not superseded in any way by this special arrangement. And this is so though he has effected the policies through an intermediary, whom he knew to be an intermediary and not the principal, and who has received payment from the principal, but who has not paid the broker.

IN this case the Court of Appeal had reversed a previous judgment of the Exchequer.

Mr. *Fisher* was a shipowner and merchant at *Barrow-in-Furness*. There was no insurance broker or underwriter there. Mr. *Smith*

H. L. (E.) 1878 FISHER v. SMITH.

was an insurance broker carrying on business at *Liverpool* in connection with a Mr. *Brand*. Messrs. *Skinner & Co.* of *Barrow-in-Furness* were generally employed by *Fisher* to get insurances effected for him on his vessels, and *Skinner & Co.* employed for that purpose either the present Respondent, Mr. *Smith*, or Mr. *Brand*, and it was known to *Fisher* that one or other of them was so employed to effect policies for him. In July, 1874, *Fisher* instructed *Skinner & Co.* to get insurances effected for him, altogether amounting to £4000, on a cargo of steel per ship *Eliza S. Milligan*, from *Barrow-in-Furness* to *New Brunswick*. The insurances appeared in this instance to have been effected through *Smith*, who always retained the policies till the premiums and brokerage on them had been paid to him. The usual course of business between *Fisher* and *Skinner & Co.* was this. The latter, on the 8th day of each month, made out an account with the sums due and payable by him to them, in respect of premiums, brokerage, and other charges due in relation to policies of insurance, effected by them for him in the course of the preceding month, and these accounts were settled by *Fisher's* acceptances at one month, which had been always duly paid. The account for July, 1874, was in this way delivered in August. The account for August would not be delivered till the early part of September, and it was then delivered, adjusted, and settled in the usual manner. This account included the insurance on the cargo by the *Eliza S. Milligan*. An average loss accrued in respect of the cargo of that vessel, and Mr. *Fisher*, after the 13th of August, 1874, applied to *Skinner & Co.* for his policies. *Smith* did know, throughout, that *Fisher* was the principal for whom the policies were effected. *Skinner & Co.* could not comply with the demand of *Fisher*, for the policies were then in the hands of *Smith*, who retained possession of them to satisfy his claim of lien in respect of premiums paid by him on these policies, and which had not been repaid to him by *Skinner & Co.* *Fisher*, who, till then, knew nothing of the arrangements between *Smith* and *Skinner & Co.*, denied the right of *Smith* to retain the policy in respect of claims which *Smith* had against *Skinner & Co.*, and brought an action of *detinue*. The Defendant pleaded, first, denying the detainer; secondly, denying the Plaintiff's property in the policy; thirdly, claiming a lien on policies for

premiums paid by him for the Plaintiff and at his request, which premiums remained unpaid by the Plaintiff to the Defendant during the said detention; and fourthly, a general lien for money due from the Plaintiff to the Defendant as an insurance broker for effecting the same and other policies, and for money paid, &c. The Plaintiff replied taking issue on these pleas.

The cause came on for trial before Mr. Justice *Archibald* at the Spring Assizes at *Gloucester* in 1875, when it was referred to a barrister to state a special case for the opinion of the Court, with liberty reserved to the Judges to draw any inferences of fact that might be drawn by a jury.

The case set forth the facts above stated, and, in the Exchequer, judgment was given for the Plaintiff. The Court of Appeal reversed that judgment and this appeal was then brought.

Mr. *Watkin Williams*, Q.C., and Mr. *Pritchard*, for the Appellant:—

It might be admitted as a general rule that for money and labour expended on the production of an article, the person who expended them had a lien on the article itself; but that rule was in its application subject to certain qualifications. A lien is not to be assumed in this case, for the two parties did not deal with each other, and the question between the Appellant and Respondent is not the same as it might have been between the Respondent and *Skinner & Co.* But assuming the Respondent to have a general right of lien on the policies he has effected, yet here the course of dealing which established a particular time and mode of payment really put an end to that general right of lien on *Smith's* part. In *Crawshay* v. *Homfray* (1), wharfage dues were, by the course of dealing between the parties, paid by the importer of the goods at the Christmas following the importation, whether the goods were or were not in the meantime removed. They might be in the meantime removed by the importer. Certain goods were sold to *A.*—the importer after Christmas became bankrupt—and it was held that no lien for wharfage dues could be enforced against *A.* That decision was founded on *Chase* v. *Westmore* (2), where, though a general right of lien on the part of a workman

(1) 4 B. & A. 50. (2) 5 M. & S. 180.

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was admitted, it was said that, if the parties contract for a particular mode of payment, the workman has no right to set up a claim inconsistent with that contract. *How* v. *Kirchner* (1) distinctly declared that though there was a general lien, yet, if there was a contract inconsistent with it, that lien could not be enforced. And *Kirchner* v. *Venus* (2) affirmed the same rule. The principle that where a broker knows his immediate employer to be an agent he cannot enforce against the principal a lien in order to secure payment of what is due to him from the agent, was fully explained in *Westwood* v. *Bell* (3), which had been acted on ever since and where the essential question was stated to be the knowledge of the broker that he was dealing with a principal or an agent. Here he knew that he was dealing with an agent. The moment the policy was made it became the property of *Fisher*, and could not be affected by the indebtedness of *Skinner* to *Smith*. The right of a broker to a lien is asserted in *Arnould* on Insurance (4), but it is there distinctly stated that that does not extend to the case where the broker knows that the policy is not effected for the person by whom he is immediately employed. *Kirchner* v. *Venus* (2) expressly recognised that principle, and declared that, in the case of freight itself, the general right might be affected by the special circumstances of the dealings between the parties.

There was no debt due from the Appellant himself on account of the policy, and the Respondent could not claim a lien against the Appellant's property in respect of a debt due to the Respondent from a third person to whom he had given credit. So far as the Appellant was concerned the Respondent's claims had been satisfied by the payment to *Skinner & Co.*

Mr. *H. Matthews*, Q.C., and Mr. *Maclachlan*, for the Respondent, were not called on.

THE LORD CHANCELLOR (Earl *Cairns*):—

My Lords, I do not think that your Lordships entertain any doubt as to the propriety of the decision of the Court of Appeal in this case.

(1) 11 Moo. P. C. 21. *Bock* v. *Gorrissen*, 2 D. F. & J. 434.
(2) 12 Moo. P. C. 361; see also (3) 4 Camp. 349.
(4) Page 139, *et seq.*

There are here substantially three questions in the case which have been argued by the learned counsel for the Appellant. In the first place, was there in the Respondent, from the nature of the transactions, a lien? Secondly, was that lien superseded by any contract or course of business inconsistent with it? And thirdly, was it discharged by any payment which was a payment to the Respondent?

Now, my Lords, as to the question whether this is a case in which lien originally would arise in the Respondent, I think there can be no doubt. He is the person who effected the policies of insurance, he either paid the premiums or became liable for the premiums, and his was the labour and the care through which the insurances were effected. According to the well-known rule of law he would be entitled, by common law, for his labour and care and his money expended, to a lien, in the nature of holding possession of the policies, and he would be entitled to that lien against every person,—against the owner of the goods for whose benefit the policies were effected, and against any intermediaries who might have intervened between the owner of the goods and himself. That appears to me to be the ordinary and well-known rule of law, and I do not think it was seriously disputed at your Lordships' Bar.

But, my Lords, was there any contract or course of dealing in the case superseding that lien which, ordinarily speaking, would have arisen? As to that, the argument has assumed the shape of an argument that the lien was superseded, whether it was a lien of the Respondent or of the intermediary, *Skinner;* but I will take it as a lien of the Respondent. The course of dealing is a question of fact, and is to be ascertained from the statements in the case, with the power which your Lordships have, and which the Court below had, to draw whatever may be the inferences of fact that you think a jury would or ought to have drawn. The course of dealing was this: The Respondent, *Smith,* effected in the course of the month a number of insurances for *Skinner & Co.;* at the end of the month, or within the first ten days of the succeeding month, he furnished *Skinner & Co.* with an account of all that he had expended, and of his commission, and he expected to receive payment in cash on the 10th of the following month for

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what he had so expended. It is said that that was a giving of credit, and that it was inconsistent with maintaining a lien, and that it superseded any right of lien which might otherwise have existed.

My Lords, I could quite understand a course of business of that kind, with a slight addition, superseding the lien. A case of *Crawshay* v. *Homfray* (1) was cited, in which there was an additional element in the course of business. There a wharfinger was in the habit of receiving goods upon which he might have had a lien, but the course of business was that he parted with the goods from time to time, receiving payment at the end of every six months, or at the end of every year, for all his dues; and it was held that that course of business prevented him from maintaining his right of lien. If it had been the course of business here for the Respondent not merely to effect these policies, but from time to time to give them up as they were effected, and simply to stand upon his right to be paid at the end of the month, then I can understand that the case ought to be likened to the case to which reference was made.

But instead of that being so here, your Lordships have exactly the opposite state of facts found in this case, because not only is there no statement that it was the habit for the policies to be delivered up at the end of the month, and not only is the case one in which you are dealing with a kind of article, namely, policies of insurance, as to which there is no immediate necessity for delivering them up as soon as they are effected, but, in addition to that, you have a precise statement, inserted apparently for this very purpose, that it was not the usual practice for the Defendant or his partner to part with the original stamped policies to *Skinner & Co.* until the premiums were received from them. What does that mean but this, that the habit of business between the parties was that the Respondent insisted upon and held firm by his lien? And no instance can be given of an opposite kind. My Lords, the conclusion of course, as a matter of fact, upon that is, that the course of business was not any superseding of the lien, but was a course of business by which the premiums were settled month by month, the lien notwithstanding being maintained until payment. That, my Lords, answers the second question.

(1) 4 B. & A. 50.

Then is there anything which has discharged the lien by payment? The moment your Lordships find that the lien was a lien of the Respondent, there is no pretence for saying that there was any payment to him, because such payment as has been made was payment to *Skinner & Co.*, the intermediary, and the learned counsel for the Appellant very properly said that he could not contend that *Skinner & Co.* were the agents of the Respondent to receive payment.

My Lords, that exhausts the whole of the case, and under these circumstances I submit to your Lordships that the appeal must be dismissed with costs.

LORD PENZANCE:—

My Lords, I have listened with great attention to the argument which has been urged upon the part of the Appellant, and I confess I have been quite unable, throughout that argument, to appreciate the existence of any considerable difficulty in this case.

The Plaintiff, Mr. *Fisher*, lived at a place called *Barrow-in-Furness*, which is at some distance from *Liverpool*, and he was minded to open a policy of insurance upon some goods belonging to him. He employed a local agent at *Barrow-in-Furness* named *Skinner* to effect that policy, and *Skinner* obviously would have to communicate with *Liverpool* in order to do it. *Skinner* might have addressed himself to some *Liverpool* underwriter; but I apprehend that, although, as appears in this case that might be done, a much more convenient method of carrying out *Fisher's* purpose was to employ some broker in *Liverpool* who would be be able to make terms on the spot for a satisfactory premium. Accordingly *Skinner* employed the Defendant as a sub-agent of Mr. *Fisher*, the owner of the goods, and employed him to effect the policy. Thereupon the Defendant effected a policy and kept it in his hands, as I believe is the universal practice of brokers effecting insurances.

The result of that transaction, as it seems to me, would be to make Mr. *Smith*, the Defendant, the sub-agent of Mr. *Fisher*. Mr. *Fisher* knew that he had been employed for the purpose of effecting the policy, and Mr. *Smith* knew that he was effecting the

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policy, not for *Skinner* but for *Fisher*. It was, therefore, a perfectly well understood transaction; the principal at *Barrow-in-Furness* had employed the local agent, the local agent had employed the agent at *Liverpool*, that agent thoroughly understanding for whom he was acting, and the principal thoroughly understanding that the local agent was acting for him. Under these circumstances it appears to me that the ordinary rule of law, that a lien would arise in favour of the broker who held in his hands the policy, could not but be applicable to this case. It is precisely the same as if there had been no intermediate agent at all, and as if Mr. *Fisher* had written direct to Mr. *Smith* to ask him to open a policy for him. Having opened that policy, and having got possession of it, he was not liable to give it up to his principal until he had received the premium, which he had either paid or become liable to pay, in respect of it. My Lords, it appears to me that up to this point, and looked at in this way, the case does not admit of argument.

But then it is said,—and it is upon this ground that Mr. *Watkin Williams* has based his argument,—conceding that there would have been originally, from the nature of the transaction, a lien in *Smith* as against *Fisher* and as against everybody, yet if you look at the case you will find that a bargain was made by the Defendant *Smith* which was inconsistent with his having any such lien. And the learned counsel refers to paragraph 12 of the case, which says: "The course of business was for the said *W. H. Brand* or the Defendant to effect the policy with the underwriters, and procure and deliver to *Skinner & Co.* copies of the policies." Therefore the course of business, as there stated, was not to effect a policy and hand it over to *Skinner*, but to hand over to *Skinner* a copy of it. "And also to send to *Skinner* a debit note of the premiums paid, and at the commencement of each month to make out and deliver to *Skinner* an account debiting them with the money due in respect of the premiums paid on the several insurances effected for them during the month then preceding, and on the 10th of each month the account of premiums paid on the preceding month was paid." That is to say, the course of business was, that when he had effected a policy he kept that policy in his own hands, he forwarded a copy of it to *Skinner*, and he debited *Skinner*

for it in the general account of all the moneys that were due between them, which general account was paid at the end of the month, or at least on the 10th day of the following month. That was the mode in which the business was usually carried on. Then the case goes on: "It was not the usual practice for the Defendant or *Brand* to part with the original stamped policies to *Skinner & Co.* until the premiums were received from *Skinner & Co.*"

Now, my Lords, I confess, reading that as a statement of the way in which the Defendant and *Skinner* carried on business, I am wholly at a loss to understand how that was inconsistent with the idea of *Smith* retaining the policy and retaining a lien. It is very true that it shews that the payment was, according to the common understanding between them, ordinarily postponed for a month or till the 10th day of the following month; but that postponement of the payment was not coupled with the giving up of the thing in the meantime. Undoubtedly a lien may be lost, as was suggested in the argument, in cases where the party agrees to give up the thing, making a bargain at the same time for payment on a future day. If the agreement is that the thing is to be surrendered and that the payment is to be postponed, that is inconsistent with a lien. But there is nothing inconsistent with a lien in saying, I will, for convenience' sake, take payment at the end of the month, and I will keep the policy in my hands in the meantime; if a loss should occur in the meantime and you want the policy, then you must pay the premium, but, subject to that event occurring, the premium need not be paid till the end of the month. It seems to me that that is the natural consequence and effect of the sort of agreement, as it is called, or rather the course of business which is here set up, and if the matter be viewed in that aspect, of course the ground taken by the Appellant entirely fails.

As regards the remaining proposition which was argued, namely, that though there was once a lien yet that lien has been discharged, I have nothing to add to what has fallen from my noble and learned friend on the woolsack.

My Lords, I am therefore of opinion that the judgment of the Court below should be affirmed.

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LORD O'HAGAN:—

My Lords, I am quite of the same opinion, and I had some difficulty, I confess, in following the argument, ingeniously and forcibly as it was put.

There were two points argued in this case. On the first point, as to the existence of a lien, the matter stands in this way: it is found that the Appellant here, Mr. *Fisher*, employed an intermediary to do his work, but the person who effected the insurance, the person who got the insurance made, and who paid the money for the making of it, and who got the policy into his hands, was the Defendant, and that was with the full knowledge and assent of the Plaintiff himself, because in the 5th paragraph of this case it is found that although *Skinner & Co.* were the persons directly employed, "the Plaintiff generally knew the name of any insurance office with which *Skinner & Co.* effected policies, without the intervention of any broker, and in the present case had been informed, before receiving the covering note, that the policies which *Skinner & Co.* were authorized to effect, as above stated, had been effected through *Brand* and the Defendant" at *Liverpool*. I do not say that that makes any great difference in the case, or that it would have been necessary for the case of the Defendant that that should have been found; but it is a fact that what was done by the Defendant here was done with the full knowledge, privity, and authority of Mr. *Fisher*, and in that way he became the authorized maker of this particular insurance.

Then it is said that the lien does not exist, because there is an antagonism between the contract made by the parties and the existence of a lien. I do not think that I can say anything more on that subject than has been said so very well by my noble and learned friend beside me. It seems to me, as plain as light, that the principle of antagonism, between a contract and the existence of a lien, does not apply to this case. The principle would have applied, if, in this case, there had been a contract that, on the making of the insurance, the policy should be given up immediately and absolutely; then the lien could not have existed without interfering with the contract between the parties. But that is not the ordinary bargain, and it is not found to be the bargain which existed between these parties; indeed, on the con-

trary, the bargain was that the policy should remain with the person who had made it and paid for it, and that he should hold it until his debt should be discharged. Therefore, I think upon the first branch of the argument there is nothing farther to be considered.

As to the second branch, I shall only say one word. If there was a lien in the case, the question is, how was that lien discharged? If Mr. *Smith*, having done this work, was entitled to be paid for it, how has he been paid? He has not been paid at all; *ex concessis* he never was paid.

But, my Lords, it was attempted to shew that the payment which Mr. *Fisher* undoubtedly made to *Skinner & Co.* was a payment to Mr. *Smith*, the Defendant. But how is that made out in any manner of way? It is said that according to the course of business he recognised a payment to *Skinner* as a payment to himself. He recognised nothing of the kind in the course of business. The course of business found to have existed on the face of this case was a course of business which led to the payment to *Skinner* by a monthly bill, and then a payment by *Skinner* to his under-agent, this Mr. *Smith*, and why Mr. *Smith* should be bound to stop in the middle of that course of business so far as it helped him, I cannot at all understand. I put the question more than once myself to the learned counsel, whether or no there was anything in the case that would entitle him to contend that the intermediary had been constituted an agent to receive payment for the sub-agent, and the answer was that there was nothing of the kind. There is not a particle of evidence in the case, or any finding upon the case, that any such acceptance was ever authorized by *Smith* to the intermediary; and if not, I cannot at all comprehend how the payment to the intermediary can be held to have been a payment to the sub-agent. If that was no payment to him, and if he had a lien, the lien is there still undischarged in justice and in law.

I observe that in the Court below, not a case of authority exactly, but a statement of the law was referred to, which I think I may very fairly and properly submit to your Lordships as covering, as the learned Judge says who cites it, the whole of this case. It is from the 2nd volume of *Phillips* on Insurance, sect. 1909.

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Your Lordships will observe how very fully it touches all parts of this case: "The agent who effects a policy for his principal, and advances the premium, or becomes responsible for it" (which is this case) "and retains the policy in his hands, has a lien upon it for his commission and the premium until the same are paid to him, or he is supplied with funds for the payment, whether his immediate employer is the assured himself or an intermediate agent, and in the latter case whether the intermediate agency was known or not known to the sub-agent claiming the lien." Here there was an intermediate agent, here there was a sub-agent, and here the knowledge of the whole transaction was in the minds of all the parties. It appears to me quite impossible to contend, that, under those circumstances, this lien does not exist as fully now as it ever existed at any period of the transaction.

On the whole, my Lords, I have no doubt that the judgment of the Court below was right, and that the appeal should be dismissed.

LORD SELBORNE:—

My Lords, I have but a few words to add to what has been already said. As to the cases of *Crawshay* v. *Homfray* (1), and *Kirchner* v. *Venus* (2), I understand their principle to be this: that a lien cannot be claimed, so as to intercept the performance of the actual contract between the parties, whether that contract is express, or is to be inferred from a certain course of dealing. If the contract is to deliver goods at a certain time, or to deliver them whenever demanded, it would be inconsistent with that contract to refuse to deliver them (the proper time having arrived) upon the ground of any lien for a price, which by agreement was not then payable. Here, no such contract has been found by the special case; for, if, on the one hand, there was a course of dealing, according to which payment of the premiums was usually made to the broker by monthly settlements with his principal, it is also found (on the other hand), that it was not the course of dealing between these parties (for which purpose I identify *Fisher* with *Skinner*), that the policies should ever be delivered to the principal, until the premiums were actually paid

(1) 4 B. & A. 50. (2) 12 Moo. P. C. 361.

to the broker. The true result is, in my opinion, that payment of the premiums was postponed till the monthly settlement, only when possession of the policies was not, in the meantime, demanded; but that, if the policies were sooner demanded, they were then to be delivered up to the principal, upon payment of the premiums, and not otherwise.

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Judgment of the Court below affirmed; and appeal dismissed, with costs.

Lords' Journals, 14th November, 1878.

Solicitors for Appellant: *Chester, Urquhart, & Co.*
Solicitors for Respondent: *Sharpe, Parkers, Pritchard, & Sharpe.*

[HOUSE OF LORDS.]

THOMAS WARD . . . . . APPELLANT;

AND

JOSEPH HOBBS . . . . . RESPONDENT.

H. L. (E.) 1878 *Nov.* 8, 12.

Implied Liability of Vendor of Goods—Statute.

A man may be morally, and, under the terms of an Act of Parliament, legally culpable, and yet his conduct may not give any right of action to a private individual who suffers injury thereby.

A breach of a statutory duty may not constitute the foundation for a private right of action.

A statement that the purchaser of an article must take it "with all faults," and that the vendor will give no warranty with it, and will refuse all future claim for compensation (where the vendor does nothing to conceal defect), relieves the vendor from all liability in respect of any defect in the article itself.

Per THE LORD CHANCELLOR (Earl *Cairns*):—If such a statement was followed by a declaration of the vendor (who knew the reverse) that he believed the article to be free from objection, there might be ground for an action of deceit.

Where a statute prohibited persons from sending animals affected with a contagious disease to market, and inflicted penalties on any person so sending them, the act of sending them, if known to be so infected, was a public offence, but did not amount by implication to a representation that they were sound, and did not of itself raise, as between the vendor of the animals and the purchaser of them, any right on the part of the purchaser to claim

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damages in respect of an injury he had suffered in consequence of their purchase.

Per LORD O'HAGAN :—The statute in such a case was passed for the benefit of the general public, and had nothing to do with the private bargains of individuals.

IN this case the Court of Appeal had reversed a judgment given by the Queen's Bench in favour of the Plaintiff in the action, now the Appellant here.

In August, 1875, *Hobbs* was possessed of a herd of about ninety pigs, forty of which were sold to a Mr. *Farmer*, a miller, residing near *Thatcham* in *Berkshire*. *Farmer* afterwards, on the 9th of September, complained to *Hobbs* that the pigs purchased from him scoured, and it was alleged that scour and want of appetite were symptoms of typhoid fever in pigs; *Hobbs* denied that he knew anything about the pigs being ill or affected in any way. On that 9th of September *Hobbs* sent to the *Newbury* market thirty-two of his pigs, to be there sold by auction; *Hobbs* would not give any warranty with them. Among the conditions of sale were the following :—

"4. The lots, with all faults and errors of description (if any), to be paid for and removed at the buyer's expense immediately after the sale."

"6. No warranty will be given by the auctioneer with any lot, and, as all lots are open for inspection previous to the commencement of the sale, no compensation shall be made in respect of any fault, or error of description, of any lot in the catalogue.

"7. If the purchaser shall neglect or fail to comply with the above conditions his deposit money shall be forfeited, and any lot or lots that may be unclaimed by the time limited shall be resold by public or private sale, and the deficiency (if any), together with the charges attending such resale, shall be made good by the defaulter at this sale."

There was an inspector of the market at *Newbury*, whose duty it was to report to the justices of the borough the state of the animals brought into the market. The inspector made his report in the usual way, saying that he had not observed anything objectionable in the pigs. *Ward* bought the thirty-two pigs at the auction, and paid £44 for them, which was a fair price at that

time and place for healthy pigs. They exhibited symptoms of illness on being driven to the Plaintiff's farm, and all but one of them afterwards died of typhoid fever, and the Plaintiff also lost some other pigs which he had bought of other people, and which he asserted had been infected with disease from *Hobbs'* pigs. He thereupon brought an action for damages to recover compensation for the loss he had thus suffered, and in his statement of claim suggested a warranty (1), and alleged that the pigs had been sent for sale at an open and public market at *Newbury*.

The cause came on for trial before Mr. Justice *Brett* at the *Berkshire* Summer Assizes in 1876, when the above facts ware proved in evidence, and it was also proved that the pigs shewed symptoms of disease as they were being driven from the market to *Ward's* farm. On the part of the Defendant *Hobbs* there was the most positive denial that he knew or even suspected that the pigs were tainted with disease, and the sickness of the pigs shewn on the way from *Newbury* market to the Plaintiff's farm, was attributed to their being driven a considerable distance without food being supplied to them on the road. It was also urged that no veterinary surgeon had been called in to attend the pigs, nor had seen them until after death, so that he could form no idea as to the time at which the disease had first attacked them. Some evidence was given with a view to shew that the Defendant had been aware, before he sent the pigs to *Newbury* on the 9th of September, that they were infected with the disease. On the other hand the Defendant's son was called as a witness, and swore that it was his duty to look after these pigs, that he had done so, and that he never had any reason to believe that they were suffering from any disease. The Defendant's counsel relied upon the absence of any evidence of warranty, or of fraud, or deceit, or of false representation, or of the fact that the pigs were diseased at the time of the sale. The learned Judge left the whole evidence to the jury, stating that in his opinion there was some evidence that the pigs had a disease at the time of the sale by auction, and that the Defendant knew it; that he must take the verdict of

(1) The words were: "The Plaintiff says, that by warranting certain pigs to be free from any infectious disease, the Defendant sold thirty-two of such pigs to the Plaintiff at and for the sum of £44."

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the jury as to the cause of the death of the thirty-one pigs, and of the other pigs which died on the Plaintiff's premises; and he asked the jury whether the Defendant knew that his pigs had a dangerous and infectious disease. The jurors returned a verdict for the Plaintiff, and assessed damages in respect of the loss of the thirty-one pigs and of the sixteen other pigs at £66. Leave to move to enter a verdict and judgment for the Defendant was reserved. The motion was made in the Queen's Bench and the rule discharged (1). The case was taken to the Court of Appeal, where the decision of the Court below was reversed and judgment entered for the Defendant (2). This appeal was then brought.

Mr. *Henry Mathews*, Q.C., and Mr. *J. Bros*, for the Appellant:—

There was evidence to go to the jury that the Defendant knew that the pigs were suffering from a contagious disease at the time of the sale, and that he had acted in a manner calculated to deceive the dealers in the market; and for the purpose of deceiving them. Assuming the proof of his knowledge to be sufficient, then he was liable in damages, notwithstanding the absence of any direct warranty as to the soundness of the pigs. For his sending them to market under such circumstances was by the 32 & 33 Vict. c. 70, forbidden in express terms, and was an illegal act the doing of which subjected him to penalties. His sending them to market must therefore be treated as a representation that he was not doing what the statute forbade, and amounted to a representation which deceived the Plaintiff into the belief that the pigs were fit objects of sale and purchase. Any one honestly acting on that representation, and then suffering from it because he had been deceived by it, as it was false, had a right of action in respect of the damage he thereby suffered. The violation of a statutory duty, if it occasioned damage to an individual, gave him a right to recover damages. Now here the evidence was strong to shew that the Defendant knew that the pigs were diseased, and the jury had found that to be the fact.

[THE LORD CHANCELLOR referred to *Hill* v. *Balls* (3).] That case might be accounted for by the fact, that the declaration only

(1) 2 Q. B. D. 331.
(2) 3 Q. B. D. 150.
(3) 2 H. & N. 299; 27 L. J. (Ex.) 45.

alleged a sale of a glandered horse, but did not state anything which shewed that the sale had been made in a place or manner forbidden by the statute. Here the statement of claim alleged that the pigs had been sent to "an open and public market at *Newbury*."

The Defendant here must be treated as having made a misrepresentation on the subject, and must be subject to all the consequences of making it. This was not like the case of *Cook* v. *Waring* (1), which had been relied on in the Court below, for here negligence was out of the question, for these pigs had been wilfully sent to market, and the *scienter* which was wholly wanting in that case, was abundantly proved here. *Baglehole* v. *Walters* (2) was not applicable, for there, though the Defendant knew of the defective state of the ship he offered for sale, and on that account would have been held liable, the ship was open to inspection, the defects in it were visible, and might have been seen at once by any one; while here the disease was and must be unknown to any purchaser, for no one could by mere inspection make himself acquainted with the fact of its existence. In *Bodger* v. *Nichols* (3) the Defendant succeeded on the ground that there was no sufficient evidence that he had any knowledge that the cow he sold was diseased; but in the course of his judgment there, Mr. Justice *Blackburn* said (4): "I entertain no doubt, but it is not necessary to decide the point, that the Defendant, by taking the cow to a public market to be sold, though he does not warrant her to be sound, yet thereby furnishes evidence of a representation that, so far as his knowledge goes, the animal is not suffering from any infectious disease. To say otherwise would be to run counter to the common sense of mankind." And the other Judges expressed themselves in a similar way.

A representation, such as sending the pigs to a public market must be taken to be, subjects the offending party to criminal, and ought to subject him to civil responsibility. In *Rex* v. *Bernard* (5) a person at *Oxford* went into a shop attired in the cap and gown of a Fellow of a college, and so obtained goods, and that was held to be a representation which, being false, subjected him

(1) 2 H. & C. 332.
(2) 3 Camp. 154.
(3) 28 L. T. 441.
(4) At p. 445.
(5) 7 C. & P. 784.

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to an indictment. In some cases a smaller matter had been held to make a party liable for the act of his agent. In *Hill* v. *Gray* (1) Lord *Ellenborough* distinctly laid it down that the vendor of a picture, whose agent allowed a person under a delusion as to its being the production of a particular painter, to become the purchaser, the agent knowing that it was a delusion, but not correcting it, must lose the sale. And in *Jones* v. *Bowden* (2) where there was, not a statutory duty, but merely a custom of the trade, to announce that goods had been damaged by sea-water and re-packed, and goods which had been so damaged and re-packed were sold without that notification, although the goods were left open for inspection, the seller was held liable to the purchaser for damage.

In *Eicholz* v. *Bannister* (3) the doctrine of warranty of title was considered, and on the sale of goods, without any warranty of title given, the conduct of the vendor was held to amount to a representation that the person selling had a title to sell; and *Peto* v. *Blades* (4) shewed that, under such circumstances as existed here, even the sheriff's auctioneer might be held liable for a representation made at the time of the sale, though there was no warranty given. In *Shepherd* v. *Kain* (5) a ship was described as "copper-fastened," but it was expressly declared that it was to be taken "with all faults"; it was open to inspection, it was purchased by the Plaintiff, who proved at the trial that it was not what was called in the trade a "copper-fastened" vessel, and, notwithstanding the restriction as to taking it with "all faults," the seller was held liable. The offering of the pigs for sale was in this case an implied warranty that they were fit to be sold as pigs; it was certainly a representation which made the vendor liable. Even the gratuitous permission to use a thing—a loan of it—has been held to imply a warranty that it was fit for the use for which it was lent, and if injury followed from its known unfitness the lender has been held liable: *Blakemore* v. *The Bristol and Exeter Railway Company* (6). The knowledge was the principle on which the Court proceeded (7). In

(1) 1 Stark. 434.
(2) 4 Taunt. 847.
(3) 17 C. B. (N.S.) 708; 34 L. J. (C.P.) 105.
(4) 5 Taunt. 657.
(5) 5 B. & A. 240.
(6) 8 El. & Bl. 1035.
(7) Ibid. 1051.

Brass v. *Maitland* (1) it was held that the shippers of goods were impliedly bound not to deliver on board ship goods of a dangerous nature unless they were properly packed so as to prevent mischief arising from them. The same doctrine was, after the fullest deliberation, adopted and declared in *Burnby* v. *Bollett* (2); and *Emmerton* v. *Matthews* (3), where all the old authorities were cited and discussed, although in the latter case the Defendant was held not to have incurred any liability. But that was because he had in fact bought an article which he believed to be good, and without taking it into his own possession had sold it again shortly afterwards to a voluntary bidder for it, having no reason whatever even to suspect that it was unfit for sale. The principle of all these cases was that if the seller had reason to doubt the soundness of the article sold, still more if he believed it to be unsound, he was responsible. Here the conduct of the Defendant shewed that he must have known that his pigs were infected, so he sent them to market, did not himself appear as their seller, but employed an auctioneer, and refused any warranty. The case was one peculiarly fit for the decision of a jury, and the jury felt no hesitation in declaring the Defendant liable as a person who had sold with a full knowledge of the real state of the animals he sold.

Mr. *Benjamin*, Q.C., and Mr. *H. D. Green*, for the Respondent, were not called on.

THE LORD CHANCELLOR (Earl *Cairns*):—

My Lords, in this case the Respondent sold a certain number of pigs by auction at *Newbury* market, and the Appellant became the purchaser of those pigs at the auction. There were conditions of sale under which the pigs were sold, and the fourth and sixth of those conditions ran in these words:—[His Lordship read them, see *ante*, p. 14.] My Lords, it turned out that almost immediately after the sale the pigs, in the hands of the purchaser, shewed unmistakable symptoms of being affected with a contagious and infectious disease, viz. typhoid fever; they rapidly died off, and nearly all

(1) 6 El. & Bl. 470. (2) 16 M. &W. 644.
(3) 7 H. & N. 586.

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of them ultimately died. Your Lordships have not heard the counsel for the Respondent in this case, and therefore all that I shall say upon this head is this: that if the finding of the jury is a correct inference from the facts of the case, that the pigs were infected with this disease at the time of the sale, and the Respondent knew it, then beyond all doubt the Respondent was, both morally and legally, highly culpable.

But the question is, Is there a right of action on the part of the Appellant?

Now the Appellant in his claim puts the case in this way: he says that by warranting the pigs to be free from any infectious disease the Defendant induced him to buy them; and then he alleges that "even if the Defendant did not warrant the pigs, the Plaintiff says that the Defendant either knowingly, or having good reason for believing that the pigs were suffering from an infectious disease, offered them for sale at a certain open and public market held at *Newbury*, and sold thirty-two of them to the Plaintiff for £44;" then he says that "the Defendant knew that the Plaintiff was a farmer, and that the pigs would be placed with other pigs, and would also be turned into certain stubble fields."

Now with regard to the allegations in the statement of claim, undoubtedly there was no warranty, and the case in that respect is unsupported. As to the other allegation in the claim that, *simpliciter*, from the fact of his sending the pigs when they were in this state to the market, a right of action arises, that was not mainly, if at all, the ground upon which the case was rested at your Lordships' Bar. The counsel for the Appellant contended that from what took place at the trial, and afterwards, any technicality founded upon the claim was out of the question, and that the Appellant might succeed, if he could, by shewing that on the facts as they were proved there was any right of action on his part on any ground whatever.

The great contest at your Lordships' Bar was this: the Appellant contended that the Respondent had made a representation which was untrue in point of fact, and that the action lay as in the nature of an action for deceit. Now, my Lords, there can, I apprehend, be no doubt of this proposition, that if a man expressly states upon a sale, that he gives no warranty, and that the goods

sold must be taken with all their faults, but if he goes on expressly to say, in addition to that, that so far as he knows, or believes, or has reason to believe, the goods are free from any particular fault, and that the animals (if it be animals that are sold) are free from any disease, if I say he expressly states that, and if it can afterwards be proved that to his knowledge the animals were tainted with the disease to which he referred, then there can be no doubt that, notwithstanding the negation of warranty, an action would lie for deceit for the false representation. There is no difficulty in reconciling these two express statements, viz., the one express statement that he does not warrant, and that the property must be taken with its faults, and the other express statement that so far as he knows or believes, the article sold is free from a particular fault. Upon that part of the case, even if your Lordships had heard the counsel for the Respondent, there would, I think, have been no controversy.

But, my Lords, the question here is, not how two express statements of the kind that I have described are to be made to stand together, but whether in addition to the express negation of warranty which I have described, there was any other representation at all.

Now, my Lords, any representation in words there clearly was not in this case. The statement, and the only statement, actually made was the one contained in the two conditions of sale which I have read. Beyond that not a word was said or is alleged to have been said on the part of the auctioneer, and the Respondent never, in any way, came in contact with the Appellant. But what was contended at your Lordships' Bar was this, that although there was no express representation made in words, yet there was conduct on the part of the Respondent which amounted to a representation, and it was endeavoured to make that out in this way: It was said, There is an Act of Parliament, the *Contagious Diseases (Animals) Act*, which enacts that any person (I am stating the effect of the clause) who sends an animal having, at the time, upon it an infectious or contagious disease, to any public or open place, shall be guilty of an offence under the Act, unless he shall prove that he was not aware that the animal was so tainted with disease; and it was said, therefore, that the Respondent here from the mere fact of sending his pigs into a public market must be

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taken, being of course held to be aware of the law upon the subject, to be representing that he was complying with, or at all events not infringing, the law, and that the animals were not tainted with any infectious or contagious disease.

Now, my Lords, I think it always desirable to abstain as far as possible from expressing an opinion upon a case which is not actually the case under consideration, and I desire here to be held free from expressing any opinion as to what, in a case in which, there being no negation of warranty, no statement such as I have read from the two conditions of sale in this case, ought to be the law as to a man who sent his pigs to a public market knowing them at the time to be tainted with disease. I observe that in a case in the Court of Queen's Bench, *Bodger* v. *Nichols* (1), coming on appeal I think from a decision of a County Court Judge, my noble and learned friend Lord *Blackburn* (or, as he then was, Mr. Justice *Blackburn*), seems to have thrown out an opinion that in a case of that kind, there being nothing upon one side in the shape of statement or negation, and there being simply the fact of a man sending diseased animals to a public market to be sold, that must be held to be a representation by conduct that the animals were free from disease, and that the person so sending them might be liable for the consequences of that representation, if it turned out to be untrue. My Lords, I repeat that I desire, so far as I am concerned, to hold myself unpledged if such a case had to be considered. But that, as it seems to me, is not the case which your Lordships have now to consider. Your Lordships have here to consider an actual, clear, unqualified statement, in writing, on the one hand, and no statement whatever, even in mere words upon the other hand, but an attempt to raise a conclusion as to an implied statement from conduct. The words of the statement on the one side are perfectly clear; they are that the vendor will not warrant the goods—that they are open to inspection, that the purchaser might inspect them, and that the purchaser must take them with all their faults. Now, my Lords, I hold that in order to countervail or qualify that, and to cut it down, there must be something as clear in statement in an opposite direction. If there had been that representation in words which I began by supposing, namely, that notwithstanding that

(1) 28 L. T. 441.

negation of warranty the vendor said that he believed the animals were free from disease, that might be the foundation of an action for deceit; but it seems to me that there is no authority and no principle upon which, in the face of a clear and unqualified statement on the one hand, such as I have described, that the purchaser must take the articles with all their faults, you are to raise, from the mere circumstance of his sending the animals to the market, the implication of a representation on the other hand that the animals were in the belief of the vendor free from disease.

I, therefore, my Lords, on this part of the case entirely agree with that which was the unanimous conclusion of the Court of Appeal in this case.

But, my Lords, there were some minor points in the case suggested as arguments upon which the appeal might be sustained, and I will refer to them very shortly. Your Lordships have not heard the counsel for the Respondents, and possibly there might be some question whether some of those points were open, but I will take them as they were urged.

The first of these which I call the subsidiary points in the case was this: it was said that there was here a breach of a statutory duty, and that wherever you have a breach of a statutory duty and any person wronged by it, the person wronged has a right of action. Now I do not stop to consider how far that proposition can be supported as a general proposition; a good deal might be said upon that subject; but it is sufficient in the present case to point out to your Lordships that the statutory duty here is of this kind; it is a duty not to send infected animals into a public place; for an obvious reason, lest they should by contact or neighbourhood taint other animals and thereby occasion injury to the public. If in that state of things some person had come forward and said, "You" (the Respondent) "sent tainted animals into this public place, and my animals, in that public place, by contact or neighbourhood were infected, and I suffered a loss," then I could understand the argument. But that is not what occurred here. What occurred in the public place was the buying and the selling, and no tainting of other animals, although it is said that after the pigs became the property of the purchaser and were taken to his farm they tainted other animals which were

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there. But that is not the gist of the enactment, and therefore it appears to me that this argument altogether fails.

The next of the subsidiary points was this: it was said that that which was sold here (this I think was rather a figurative expression than a serious argument) was not really a lot of pigs but a mass of disease—of typhoid fever. My Lords, to that all I can say is, that a pig having typhoid fever appears to me not to lose its identity any more than a man having typhoid fever ceases to be a man; and therefore the thing sold was that which it was professed to sell.

Then again it was said, and this was the last of the minor points, that what was sold here was not merely infected by disease, but was a noxious and dangerous thing, certain not only to be useless in itself but to be a source of evil and danger wherever it might be carried, and it was likened to the case of a person selling explosive substances without any warning being given to the purchaser, and without its being known or being made clear that the possession of the substances was attended with danger. My Lords, there again I should not wish to express any opinion as to how far that argument might be urged in a case where there was no express statement upon the subject of the thing sold; it is sufficient to say that it seems to me that where you have an article sold with a statement, not merely that the vendor does not warrant it, but that the purchaser must take it with all its faults, this point really becomes a branch of the first point to which I have referred; and you cannot therefore contend that the purchaser is afterwards to be at liberty to turn round and say, "There was this fault in the article which I bought which makes it a dangerous article for me to become the possessor of."

My Lords, those were the arguments which your Lordships heard urged with great skill and ingenuity by the learned counsel on the part of the Appellant, but it appears to me that they all failed, and that the decision of the Court below ought to be affirmed. I move your Lordships, therefore, that the appeal be dismissed with costs.

LORD O'HAGAN:—

My Lords, I do not regard this case as free from difficulty.

That it is not, the conflicting judgments we are required to consider make that very plain; but, on the whole, I see no sufficient reason for declining to concur with the Court of Appeal.

The matter, as presented for the Appellant, is of the first impression. No authority supports his contention. And its success would involve the establishment of a new principle, and the recognition of a legal presumption heretofore unknown.

The statement of claim relies upon a warranty, but makes no case of deceit or fraud, or failure of consideration, and contains no averment that the Plaintiff was misled by any representation of the Defendant. Warranty there was none; but, on the contrary, the conditions of sale expressly declined the giving of any; and purchasers were informed that they might make what inspection they pleased before the commencement of the sale, and that no compensation would be given "in respect of any fault or error of description of any lot in the catalogue." The very ingenious and exhaustive argument of Mr. *Mathews* addressed itself to several points which, as I observe, were not made in the pleadings, and with which the Lord Chancellor has dealt sufficiently; but the real question is that which alone seems to have been raised and considered in the Courts below, whether the offer for sale in open market, of itself, under the circumstances proved in evidence, amounted to a representation of soundness, imposing responsibility on the Defendant for the loss which the Plaintiff undoubtedly incurred? I assume, for the purpose of the argument—according to the verdict of the jury—that the Defendant knew of the diseased condition of the pigs when he sent them to market; although, for my own part, having looked through the report of the trial, I am more than doubtful of the correctness of the finding in that respect. The positive testimony of the Defendant to the contrary has strong corroboration in that of the inspector (a veterinary surgeon) under the *Contagious Diseases* (*Animals*) *Act*. He examined the pigs in the discharge of his official duty, and believed them to be perfectly sound. But taking it as proved that the animals were known by the Respondent to have disease, I should not be prepared to say, even in the absence of the conditions of sale on which he relies, that the non-disclosure of the fact would, without more, have cast liability for loss upon him.

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We must deal with the law as we find it, even though we might desire, in cases of bargain and sale, to compel more full and candid statements on peril of grave responsibility; and that law is stated thus by Judge *Story* in his book on Contracts (1): "The general rule both of Law and Equity, in respect to concealment is, that mere silence with regard to a material fact which there is no legal obligation to divulge, will not avoid a contract, although it may operate as an injury to the party from whom it is concealed." And again (2), "Although a vendor is bound to employ no artifice or disguise for the purpose of concealing defects in the article sold, since that would amount to a positive fraud on the vendee; yet, under the general doctrine of *caveat emptor*, he is not ordinarily bound to disclose every defect of which he may be cognisant, although his silence may operate virtually to deceive the vendee."

I take it that this is a correct statement; and, if so, as there was not in the present case any "legal obligation" to divulge the knowledge assumed to belong to the Defendant, his simple failure to divulge it did not nullify the contract; and could not be taken, as the Appellant insists, either as a representation of the soundness of the animals, or as a representation that he did not know them to be unsound. If the vendee bought at his own risk and in reliance on his own inspection without requiring a warranty, which he might have made the condition of his purchase, and if there was not—and no one says there was—any artifice or disguise on the part of the vendor, for the purpose of concealment, then I should be disposed to hold, if it were necessary to decide upon such a state of facts, that the mere silence, which he was not asked to break, did not impose responsibility. However, the case of the Respondent is different and stronger, and we are not required to pronounce such a decision.

The argument of the Appellant rests upon implication and inference arising from conduct; and, no doubt, conduct may amount to representation as clearly as any form of words. But the express declaration made in the conditions of sale, in my opinion, forbade the implication and repelled the inference. The purchaser was informed that he would have no warranty, and that he was not to expect compensation for any fault. He was told to inspect for

(1) Page 511. (2) At p. 551.

himself and to judge for himself, and warned that he must take the consequences of any error he might commit in making a bad bargain. He had the clearest intimation that the vendor, whatever might be his state of knowledge, expressly refused to give any help to a right decision or make any disclosure of any kind.

The legal result is stated very plainly by Lord *Ellenborough* in the familiar case of *Baglehole* v. *Walters* (1), the authority of which has never, so far as I know, been called in question: "Where an article is sold with all faults I think it is quite immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser. The very object of introducing such a stipulation is to put the purchaser on his guard, and to throw upon him the burthen of examining all faults, both secret and apparent. I may be possessed of a horse I know to have many faults, and I wish to get rid of him for whatever sum he will fetch. I desire my servant to dispose of him, and instead of giving a warranty of soundness, to sell him with all faults. Having thus laboriously freed myself from responsibility, am I to be liable if it be afterwards discovered that the horse was unsound?" Now the Defendant in this case did precisely what was held by Lord *Ellenborough* to protect a vendor against liability for all faults, "secret or apparent." And I repeat, it has not been pretended that he was guilty of any contrivance to conceal or to deceive. The condition of sale, by declining to compensate, suggested that there existed, or might exist, a state of things which, but for it, would entitle to compensation. It at once challenged inspection, and aroused attention to the probable necessity of making it, and so left the purchaser without reason to complain.

How is the force of this authority sought to be evaded? Only, so far as I understand the argument, by reliance on the *Contagious Diseases* (*Animals*) *Act*. It is said that this Act, making the exposure in a market of animals affected by contagious disease a criminal offence, warrants purchasers in presuming that persons so exposing them intend to represent them, and represent them in fact, as free from such disease; and that, therefore, responsibility attaches as on a warranty created through a representation by

(1) 3 Camp. 154.

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conduct. This is very subtle and not very tangible reasoning, and it has failed to satisfy my mind.

In the first place, the condition of sale, by its express refusal of warranty or compensation appears to me to negative the existence of any representation of the kind. It is distinct notice to all the world that there may be faults which the vendor does not choose to disclose, and for which he will not be accountable. Next, the assumption, and the gratuitous assumption is, that vendors and purchasers generally know not merely of the existence, but also of the terms of the Act, and of its penal operation, and of its effect in probably deterring the owners of unsound cattle from bringing them to sale. There may be no such knowledge, and even if it exists, what reason have we for supposing that men will not violate the law and brave its penalties, taking the risk of discovery and the chance of escape? What right or reason has any body to presume that the dealer, by the fact of his offers to sell, demonstrates, or intends to demonstrate, his compliance with the Act, and consequently affirms the soundness of the animal?

In this case, if the jury's finding was correct, the Defendant, knowing he would be guilty of a breach of the statute, subjecting him to punishment, ventured on it notwithstanding, and got off scot-free, for his pigs passed the inspector, and were pronounced to be without disease. Many similar transactions may and must take place, for obedience to the law cannot always be expected when evasion of it may be the source of profit; and I find it impossible to hold that the mere appearance of animals in a market can be reasonably presumed to imply their immunity from contagious illness in any case, and certainly not in a case in which the owner negatives any such implication by refusing to warrant and insisting on an acceptance "with all faults."

I cannot see any real relation between the penal statute and the contract we are considering, and I agree with Lord Justice *Brett* that the attempt to connect them is "illusory." The Act was passed for the benefit of the general public; it has nothing to do with the bargains of particular persons.

Under such circumstances as are now before us, the presumption on which the Appellant rests his claim to recover the compensation which the condition of sale forbade him to expect, seems to me to

have no foundation in fact or law, and I concur with my noble and learned friend that the appeal should be dismissed with costs.

LORD SELBORNE:—

My Lords, I feel compelled to agree in the judgment moved by my noble and learned friend on the woolsack, though I confess I do so with some reluctance.

Upon the question of implied representation I have never felt any doubt. Such an implication should never be made without facts to warrant it, and here I find none, except that in sending for sale (though not in selling) these animals, a penal statute was violated. To say that every man is always to be taken to represent, in his dealings with other men, that he is not, to his knowledge, violating any statute, is a refinement which (except for the purpose of producing some particular consequence) would not I think appear reasonable to any man.

The argument which, for some time, most weighed with me was, that for a man to sell to another, without disclosing the fact, an article which he knows to be positively noxious, and which the other man does not know to be so (even though he expressly negatives warranty, and says that the purchaser must take his bargain with all faults) is an actionable wrong. I confess I should not be sorry if the law were so; but I know no authority for the proposition that such is the law, even with respect to the particular case of infectious disease in animals sold. The very nature of the condition that the buyer is to take the animals with all faults implies that they may be diseased, without any distinction between infectious and non-infectious disease; and I cannot think that the legislation, which has recently taken place in the public interest, against particular acts tending to propagate such disease, can make that an actionable wrong, as between the parties to a private contract, which would not be so without it.

Judgment of the Court below affirmed, and appeal dismissed with costs.

Lords' Journal, 12th November, 1878.

Solicitors for the Appellant: *Abbott & Co.*
Solicitors for the Respondent: *Rickards, Walker, & Maude.*

Applied. REX v. NORTHUMBERLAND COMPENSATION APPEAL TRIBUNAL, *Ex parte* SHAW [1951] 1 K. B. 711

[HOUSE OF LORDS.]

H. L. (E.) 1878 *Nov.* 26.

THE OVERSEERS OF THE POOR OF WALSALL AND THE MAYOR, &c., OF WALSALL . . . . . } APPELLANTS;

AND

THE DIRECTORS, &c., OF THE LONDON AND NORTH WESTERN RAILWAY COMPANY . . . . . } RESPONDENTS.

Rate—Jurisdiction of Queen's Bench—Appeal.

4 QBD 422-3. Post 468 5 QBD 77 6 QBD 316 9 QBD 622 12 QBD 3

The jurisdiction of the Queen's Bench upon questions relating to the validity of parochial rates is not purely consultative but judicial, and the decisions of that Court upon such matters are therefore open to appeal.

A decision of the Queen's Bench on such a matter, though given in the form of discharging a rule for quashing an order of sessions, is an "Order" within the 19th section of the *Judicature Act*, 1873, and is therefore subject to appeal.

THIS was an appeal against a decision of the Court of Appeal.

The overseers of *Walsall* had made a rate and had assessed the property of the Respondents within the borough and "foreign" of *Walsall*. The Respondents disputed the rate on account of its amount, contending that it was in excess of the sum to which they, under certain local acts, and the Public Health Acts, were liable. On appeal to the borough quarter sessions, the rate was ordered to be amended by reduction of the amount, subject to a special case to be stated for the opinion of the Court of Queen's Bench. The case was stated accordingly, and four questions were put as to the validity of the rate, and then the case ended thus: "If the Court shall answer the first question in the affirmative, the Order of the Court of Sessions is to be confirmed. If the Court shall answer the second, third, or fourth questions in the affirmative, the rate is to be remitted to the Court of Quarter Sessions to be amended in accordance with the opinion of the Court." Under an order made by the Queen's Bench Division, by consent of counsel on both sides, a writ of *certiorari* was, on the 1st of May, 1877, issued, commanding the recorder of

the borough to send up the proceedings and orders on the appeal heard before him. The return to the writ was duly made in the Easter Sittings of 1877. The ordinary rule to shew cause why the order of the sessions should not be quashed was issued, and was argued, and on the 24th of November, 1877, was discharged, and the order of the quarter sessions confirmed, but leave to appeal was given. On the 29th of November, 1877, an appeal was lodged. On the 5th of February, 1878, the case came on in the Court of Appeal, and that Court directed the arguments to be confined to the question whether that Court had, or had not, any jurisdiction to determine an appeal upon such a matter. After time taken to consider, Lord Chief Justice *Cockburn* and Lord Justice *Brett* expressed an opinion that the Court of Appeal had not jurisdiction to hear an appeal in such a case, while Lord Justice *Bramwell* and Lord Justice *Cotton* held that it had (1). As there was this equal division of opinion the judgment of the Court below stood affirmed. This appeal was then brought (2).

Mr. *Herschell*, Q.C., and Mr. *Anstie*, for the Appellants:—

It is objected that the Court of Appeal had no jurisdiction to hear this appeal because the decision of the Queen's Bench was not a "Judgment" or "Order" within the meaning of the 19th section of the *Judicature Act*, 1873, but was merely the discharge of a rule obtained in the Court as to a matter in which the Queen's Bench did not exercise its ordinary jurisdiction, but rather was consulted by, and gave advice to, the quarter sessions. The argument was that the Court had, in fact, no power to hear appeals from the quarter sessions upon rating cases, but could only give advice to the sessions as to the course which they ought to pursue. It is true that the statutes which required the overseers to raise rates for the relief of the poor, and for similar purposes, made their acts subject to the approval of justices in petty session, and gave the right of appeal against their order to the quarter sessions, and to no other tribunal. And as the whole matter was thus dependent on statutory enactment it was said that

(1) 3 Q. B. D. 457.

(2) There was another question stated in the papers relating to the assessment of the rate itself, but the only matter argued in this House was that of the jurisdiction of the Court of Appeal.

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no Court but that which was designated in the statute, could claim jurisdiction as a Court of Appeal. That argument cannot affect the present case. The Queen's Bench had a general authority to supervise the decisions of inferior tribunals, and in the cases relating to rating has always exercised that authority in a very complete manner. The form in which the authority was exercised could not affect the authority itself. There had been, no doubt, an established practice, established originally by Act of Parliament, for the sessions, whenever a case of difficulty in matter of law arose, to consult the Judges of Assize. The opinion given by the Judges was always followed. That form of proceeding was not found to be convenient, and was gradually superseded by another, in which the sessions gave a judgment, but also stated a case for the opinion of the Court of King's Bench upon the subject matter of that judgment. That Court, on the case so stated, pronounced the decision that the order of the sessions was to be affirmed, or to be quashed. The opinion thus expressed was always followed by the Sessions. But the Court never would give a decision on a case merely stating facts to obtain an opinion: *Reg.* v. *Kesteven* (1), *Reg.* v. *Sutton Coldfield* (2). In practice, therefore, though not in form, the decision of the Queen's Bench was a decision having the character of a judgment on appeal. In other instances where cases were not stated by the sessions, the orders of session were brought up to the Queen's Bench by *certiorari*, and were confirmed or were quashed. The issuing of a *certiorari* was a mere form to bring the facts and orders under the cognizance of the Court, but it did not constitute the power of the Court to deal with them. The instances in which orders of the sessions were thus brought before the Court were numerous, and they were not confined to those in which the objection to the order appeared on the face of it. In *Ryslip Parish* v. *Hendon* (3) an order of sessions was quashed because, though the Court of King's Bench would not have interfered with the order if it had stood alone, the Court did so because the reasoning on which it was declared to be founded was decided to be

(1) 3 Q. B. 810, at p. 819. See also *Reg.* v. *Marton cum Grafton*, 10 Q. B. 971, at p. 975.

(2) Law Rep. 9 Q. B. 153.

(3) Farresley's "Cas. temp. Holt," tit. "Poor," 574.

incorrect. And in *Dimchurch* v. *Eastchurch* (1), in the matter of a rate in aid, the Court set aside one part of the order of sessions and allowed another part to stand. In *Wangford* v. *Brandon* (2) an order was quashed because it was for the removal of a "family," and the Court said that that word would include children who were irremoveable. And there was not one instance in which a decision of the Court had been disobeyed by the sessions, while there were many in which these orders had been brought up by *certiorari*, and confirmed or quashed as to the Judges might seem fit: *Reg* v. *Brightwell* (3) and many cases in *Holt* (4) and *Salkeld* (5) were referred to. And in the recent case of *Reg.* v. *Justices of Staffordshire* (6) the quarter sessions decided a settlement case, but had omitted to give costs, and the case having been afterwards brought before them to remedy this omission, they made an order for costs, which the Court of Queen's Bench quashed as being something done after the proper decision of the case itself had been pronounced, and therefore without authority. All these instances proved that the jurisdiction which the Queen's Bench exercised was not merely consultative but was mandatory.

But then it was said that here the form of the proceeding negatived the jurisdiction of the Court, for that here was a case in which the justices had allowed a rate, and the sessions had made an order to have that rate amended, and that the order of sessions having been brought up by *certiorari*, a rule had been obtained to quash the order, and the Queen's Bench had merely discharged its own rule; and so it was argued that that discharge of its own rule did not come within the description of an "order" and "judgment" contained in the 19th section of the *Judicature Act* of 1873 (7),

(1) Farresley's "Cas. temp. Holt," tit. "Poor," 574.

(2) Ibid. 574.

(3) 3 Keb. 464.

(4) Tits. "Justices of the Peace" and "Poor."

(5) Tit. "Poor."

(6) 7 El. & Bl. 935; 16 L. J. (M.C.) 179.

(7) 36 & 37 Vict. c. 66 (*Judicature Act*, 1873), s. 19: "The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any Judgment or Order, save as hereinafter mentioned, of Her Majesty's High Court of Justice, or of any Judges or Judge thereof, subject to the provisions of this Act, and to such Rules and Orders of Court for regulating the terms and conditions on which such appeals shall be allowed, as may be made pursuant to this Act."

Sect. 45: "All appeals from petty or quarter sessions, from a County Court, or from any other inferior Court, which

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so that even if an order or judgment of the Court on a sessions case was appealable, it was not so here, since the mere discharge of a rule was neither an order nor judgment. That argument cannot be sustained, first, because the interpretation clause (s. 100 of the *Judicature Act*, 1875) distinctly declares that "order" shall include "rule;" and next, because the general purpose of the Judicature Acts was to give an appeal in cases where it had not existed before, and among these were cases in which the judgment of the Court was always given in the form of making absolute or discharging a rule it had previously granted. In such a case the Court really pronounced a decision which was attended with all the consequences of the most formal judgment of the Court.

Mr. *F. A. Bosanquet*, and Mr. *Neville*, for the Respondents:—

The Court of Appeal was established by the *Judicature Act* of 1873. Its powers and jurisdiction must be determined by that Act alone, and no mere analogies drawn from previous practice at Common Law can be applied to it. The 18th section of the Act, which must be read in order fully to see the bearing of the 19th section, describes the Court, and says there shall be vested in it "all jurisdiction and powers of the Courts following." Passing over the first three sub-sections, which relate to Chancery and the Stannaries, the 4th sub-section says, "All jurisdiction and powers of the Court of Exchequer Chamber" shall be exercised by the new Court. Now, it cannot be pretended that the Exchequer Chamber ever sat as a Court of appeal or review upon

might, before the passing of this Act, have been brought to any Court or Judge whose jurisdiction is by this Act transferred to the High Court of Justice, may be heard and determined by the Divisional Courts of the High Court of Justice. . . . The determination of such appeals respectively by such Divisional Courts shall be final, unless special leave to appeal from the same to the Court of Appeal shall be given by the Divisional Court by which any such appeal from an inferior Court shall have been heard."

Sect. 47: No appeal on judgments in criminal cases, except for error on the face of the record, or on cases reserved.

Sect. 49: "No order made by the High Court of Justice, or any Judge thereof, by consent of the parties, or as to costs only, which by law are left to to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or Judge making such order."

Sect. 100 (Interpretation clause), "'Order' shall include rule."

Order LVIII. r. 2, *Judicature Act*, 1875, "All appeals to the Court of Appeal shall be by way of re-hearing, and shall be brought by notice of motion in a summary way. . . . The Appellant may appeal from the whole or any part of any judgment or order."

the decisions of the Queen's Bench in matters relating to parish rates or settlements. The words at the beginning of the 19th section are no doubt very general, and appear to give an almost unlimited power to hear appeals, but that very section itself says that the power is to be "subject to the provisions of this Act," and the provision in the 18th section had already given an express limitation to the power by the reference to the "jurisdiction and powers of the Exchequer Chamber." But there were also specific restrictions introduced into the 19th section itself, for after the general grant of power to hear appeals "from any judgment or order of a Divisional Court," there was the limitation, "save as hereinafter mentioned." Now, in sect. 47 criminal cases are expressly mentioned, and it is declared that they shall be heard before a tribunal specially constituted, and "the determination in such questions shall be final and without appeal." Then, again, there were exceptions as to orders for costs; and these various provisions shewed that the general power to hear appeals had many restrictions and must not be taken in a universal sense. It has not only been held that there was no appeal in criminal cases, except for error apparent on the face of the record, but in the case of *Reg.* v. *Steel* (1) that a decision on the costs in the case was included in the general prohibition of appeals in criminal cases. And in *In re Ellershaw* (2) it was held that an application calling on the sessions to shew cause why they should not state a case for the opinion of the Queen's Bench must be made to that Court, and not to a divisional Court of Appeal. All this shewed that there were many restrictions practically affecting the right to appeal, though given in such general words in ss. 19 and 45 of the *Judicature Act* of 1873. Then, again, the very form of appeal shewed that it was not to be used in such a case as the present. Order LVIII. declared that every appeal should be by way of re-hearing, and should be brought by notice of motion, and in no other way; so that nothing here appeared to be within the rules of practice relating to appeals.

The cases, therefore, which had been cited, even if they appeared to be cases where the Queen's Bench had seemed to exercise an appeal jurisdiction in matters of this sort, are not

(1) 2 Q. B. D. 37. (2) 1 Q. B. D. 481.

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really applicable. The history of its jurisdiction was given in *Reg.* v. *Chantrell* (1) which supplied another instance to prove that the jurisdiction of the Queen's Bench over the decisions of the quarter sessions was not so universal as it was now contended to be. But it may also be observed that the cases referred to are, in fact, cases where the objection to the order of sessions always did appear on the face of the order itself, as in the case where a "family" was ordered to be removed; and in that other case where, for the purpose of obtaining a rate in aid, one parish was improperly ordered to be annexed to another; and in that other case where the order was quashed because the reasons on which it was said to be founded appearing on the face of it, the Court held them to be insufficient and quashed the order itself.

But supposing the jurisdiction of the Queen's Bench in these cases to be not consultative merely, but also mandatory, and supposing, therefore, that an appeal might lie from the Queen's Bench to the Court of Appeal (which, however, is entirely denied), there is no authority whatever to shew that a farther appeal will lie from the Appeal Court to this House. At all events, therefore, the present appeal must be dismissed.

Mr. *Herschell* replied, and contended that the words of the 19th section of the *Judicature Act* of 1873 were clearly in favour of an appeal to the Appeal Court, and, of course, afterwards, to this House, and that all the other sections of the statute on the same subject confirmed rather than contradicted that construction.

In the course of the arguments *Bacon's* Abridgement, tit. "Court of King's Bench," A. 3; *Reg.* v. *Malden* (2), *Reg.* v. *Ronton Abbey* (3), *Reg.* v. *Mast* (4), *Reg.* v. *Goodcheape* (5), *Rex* v. *Tedford* (6); *Rex* v. *Oulton* (7); *Rex* v. *Moseley* (8); *Reg.* v. *Monmouthshire* (9), and 5 & 6 Vict. c. 38, were referred to.

THE LORD CHANCELLOR (Earl *Cairns*):—

My Lords, your Lordships have heard this case very fully and ably argued, and after paying great attention to it, I think that

(1) Law Rep. 10 Q. B. 587.
(2) 7 Mod. 247.
(3) 2 T. R. 207.
(4) 6 T. R. 154.
(5) 6 T. R. 159.
(6) Bur. Sett. Cas. 57.
(7) Ibid. 64.
(8) 2 Burr. 1040.
(9) 8 B. & C. 137.

no doubt exists in the mind of any of your Lordships as to the conclusion at which you ought to arrive.

My Lords, the Respondents were fixed by a decision of a Court of Quarter Sessions with the payment of a certain rate for sanitary purposes, but the overseers of the township of the foreign of *Walsall*, as the sanitary authority, being anxious to have a larger rate, obtained, in the usual way in the Queen's Bench Division, an order for a writ of *certiorari* to bring up the proceedings under which that rate was fixed, for the purpose of having it quashed. I will refer presently to the form of the proceedings. When that case was argued before the Court of Queen's Bench, the order of the Court of Quarter Sessions was not quashed, but was confirmed, and thereupon the parties who had moved the Court of Queen's Bench, namely, the overseers, moved in the Court of Appeal to reverse the decision of the Court of Queen's Bench. When brought before the Court of Appeal the objection was taken by the Respondents that there was no jurisdiction in that Court to hear the appeal—the ground being that, having regard to the nature of the subject, the decision of the Queen's Bench Division was final.

My Lords, the Court of Appeal, consisting of four learned members, was divided in opinion upon that point. The Lord Chief Justice of *England* and Lord Justice *Brett* were of opinion that there was no jurisdiction; Lord Justice *Bramwell* and Lord Justice *Cotton* were of opinion that there was jurisdiction and, under those circumstances, the decision of the Queen's Bench Division remained. Your Lordships have now had the matter brought before this House, and have heard it argued upon the question of jurisdiction merely. If you are of opinion that the decision of the Court of Queen's Bench was not final, that decision upon the merits has not yet been reviewed by the Court of Appeal, and therefore in these circumstances your Lordships will, I apprehend, take the course of sending the matter back to the Court of Appeal, if the Court of Appeal has, in your opinion, jurisdiction to deal with it.

My Lords, that which is complained of is this—a judgment of the Court of Queen's Bench discharged a rule *nisi* which had been obtained to shew cause why the order of the Court of Quarter

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Sessions fixing the lower rate should not be quashed. By the interpretation clause affixed to the *Judicature Act* of 1873, the word "order" in the body of the Act is held to include "rule;" and therefore when, in the body of the Act, we read the word "order" we read it as if the word "rule" was also contained there. Now the 19th section of the *Judicature Act* of 1873 provides that "the Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice or of any Judges or Judge thereof." The words "save as hereinafter mentioned," it is agreed, refer to particular exceptions afterwards made as to costs and as to orders by consent, and, having regard to the enactment passed afterwards, and which is to be read as one with the *Judicature Act*, these exceptions would also include cases where decisions of the primary Courts are made final by Act of Parliament. But none of those exceptions applies to the present case; and therefore, for the present purpose, the section may be read as if the words "save as hereinafter mentioned" were omitted; and, as I have said, it is to be read as if the word "order" included the word "rule." Reading it in that way, your Lordships find that it is enacted that the Court of Appeal shall have jurisdiction to hear and determine appeals from any rule of the Queen's Bench Division.

My Lords, if the matter rests there I own I do not think it is open to doubt that these clear and definite words of the Legislature must have their full effect given to them. Your Lordships have here, on the one hand, a rule of the Queen's Bench Division, and you have, on the other hand, an enactment that every rule of the Queen's Bench Division is to be open to appeal. That being so, unless there is something more which has not yet been brought forward, those clear words must have effect given to them, and it lies upon those who wish to cut down their effect, to shew how that is to be done.

Now, the way in which it is attempted to be done is this. It is said that in the particular matter which here came before the Queen's Bench Division, the Court of Queen's Bench when it existed as a separate Court, did not act by virtue of its ordinary jurisdiction, and did not indeed act by analogy to its contentious

jurisdiction, in the ordinary sense of that term, but acted in a "consultative manner,"—to use the expression of the Lord Chief Justice,—that it was, as it were, consulted by a Court of Quarter Sessions, and the Court of Quarter Sessions, it is suggested, never parted with a case upon which it was consulting the Court of Queen's Bench, but in some way kept seisin of the case, until it had obtained the opinion of the Court of Queen's Bench, and then, when it had obtained that opinion, proceeded to act by virtue of its own jurisdiction, that is to say its jurisdiction as a Court of Quarter Sessions.

My Lords, if that had been the case, if that was an accurate representation of the jurisdiction, no doubt an element of difficulty might be interposed. It would then have to be considered whether really what your Lordships have before you was a rule or an order of the Court of Queen's Bench at all. But, my Lords, I apprehend that that is, I must say, an inaccurate view of the jurisdiction exercised by the Court of Queen's Bench. As it seems to me, that jurisdiction may be stated very shortly, and there is really,—I say it after hearing all that has been said on both sides,—little or no controversy upon the subject. The Court of Quarter Sessions was in the first instance the Court of Appeal before which objections to rates of this kind were to be brought. When the Court of Quarter Sessions had determined a rate, that determination, was, as a general rule, final, upon the merits. There was no Court of Appeal in the ordinary sense of the term before which the facts upon which the Court of Quarter Sessions had proceeded could be brought by way of review. But the Court of Quarter Sessions, like every other inferior Court in the kingdom, was open to this proceeding; if there was upon the face of the order of the Court of Quarter Sessions anything which shewed that that order was erroneous, the Court of Queen's Bench might be asked to have the order brought into it, and to look at the order, and view it upon the face of it, and if the Court found error upon the face of it, to put an end to its existence by quashing it; not to substitute another order in its place, but to remove that order out of the way, as one which should not be used to the detriment of any of the subjects of Her Majesty.

My Lords, that jurisdiction of the Court of Queen's Bench was

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found in many cases, in reference to the quarter sessions, a useful jurisdiction. It appears farther, if we go back to the ancient history of quarter sessions, that the quarter sessions had a power (the exact limit of which perhaps it is not necessary now to define), if they were in difficulty, of applying to the going Judge of Assize and asking his advice and assistance in making an order. An appeal to the Judge of Assize of that kind was not a parting by the Court of Quarter Sessions with its jurisdiction, but was really that which is spoken of by the Lord Chief Justice, a "consultative" act on the part of the Court of Quarter Sessions, the Court of Quarter Sessions still retaining and exercising its jurisdiction after the consultation had taken place. But supposing that the Court of Quarter Sessions did not adopt that course, there was still another mode by which any question of law which appeared to the Court of Quarter Sessions doubtful, might be left open for the exercise of the judgment of a higher tribunal. All that was necessary was that the Court of Quarter Sessions, in making its order, should not make it an unspeaking or unintelligible order, but should, in some way state upon the face of the order, the elements which had led to the decision of the Court of Quarter Sessions. If the Court of Quarter Sessions stated upon the face of the order, by way of recital, that the facts were so and so, and the grounds of its decision were such as were so stated, then the order became upon the face of it, a speaking order; and if that which was stated upon the face of the order, in the opinion of any party, was not such as to warrant the order, then that party might go to the Court of Queen's Bench and point to the order as one which told its own story, and ask the Court of Queen's Bench to remove it by *certiorari*, and when so removed to pass judgment upon it, whether it should or should not be quashed. In that case, as I said just now, the jurisdiction of the Court of Queen's Bench was merely a jurisdiction to leave the order standing or to remove it out of the way. It was not a jurisdiction to substitute for it another or a different order; that would be making the Court of Queen's Bench, in the ordinary sense of the term, a Court of re-hearing or of appeal. Now, if that is the jurisdiction of the Court of Queen's Bench, it is not a jurisdiction which in any respect can be called a consultative jurisdiction; it is a jurisdiction

of the Court of Queen's Bench as a Court higher than the Court of Quarter Sessions to overthrow and destroy an act of the Court of Quarter Sessions, and to remove it out of the way.

But then my Lords, that being, as I think it is, clear from the cases which have been cited, the origin of the jurisdiction and the form in which the jurisdiction really was exercised during the greater part, if not the whole, of the last century, it is obvious from the more modern cases which have been cited, that although that jurisdiction has not changed in substance, there has been some change in the form in which it has been appealed to. In modern times the practice has grown up, and a very wholesome and useful practice it is, of obtaining opinions from the Courts upon special cases. All Courts have from time to time had powers given to them to answer questions put to them upon special cases. And whereas in the earlier times the orders of Courts of Quarter Sessions did nothing more than state by way of recital the facts which the Court had found, and then add the order which the Court had made, the more modern cases from the Courts of Quarter Sessions seem to have assumed rather the form of special cases as to which, in language loose, but not altogether inaccurate, it has been said that the Court of Quarter Sessions asks for the opinion of the Court of Queen's Bench. In the very case before your Lordships, although in form you find that the dissatisfied party first applied for a *certiorari*, and then obtained a rule *nisi* to quash the rate, and on the *certiorari* the order of the Court of Quarter Sessions was brought up and the case appended to the order, still, when you look at the case itself, you find that the parties who stated that case, were obviously under the impression that they could induce the Court of Queen's Bench, if it did not simply confirm the order of the Court of Quarter Sessions, to answer a series of questions, after which the case might be sent back, supposing the rate not to be confirmed, to the Court of Quarter Sessions, so that the rate might be amended or modified according to the answer so obtained from the Court of Queen's Bench.

Now, it is quite true that this form of the case has given a certain colour to the argument that the Queen's Bench Division was applied to for the purpose of advice and consultation, and not for the purpose of making an order. But, my Lords, that is

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simply upon the form of the special case. The form of the proceedings before the Queen's Bench Division is clear and unmistakeable. In the old, the original form, which indicates the foundation and the ground of the jurisdiction, the dissatisfied party simply called upon the Court of Queen's Bench to quash the order made by the Court of Quarter Sessions. When that application was made to the Queen's Bench Division, the Queen's Bench Division might, as it seems to me, very well decline to answer the various forms of questions which I find put in the special case; but, whether it did or did not so decline, the party who objected to the rate and to the order of the Court of Quarter Sessions, had a right, if that order was an invalid one, to have it quashed and removed out of the way; and the circumstance, that there were appended to the special case the series of questions to which I have referred, could not in any way destroy that right of the suitor, if he was otherwise entitled to an order quashing the order of the Court of Quarter Sessions. That, my Lords, is all that I have to observe upon the form of the special case. It has given rise to a little difficulty, but to no difficulty which is serious when the whole of the circumstances are looked at.

6 Q.B.D. 316

My Lords, I will only add that I have proceeded upon the view of the 19th section of the *Judicature Act*. I am not persuaded that the 45th section has anything to say to the question. It seems to me that it is quite sufficient to look upon this as what it was, namely, a "rule," that is to say an "order" of the Queen's Bench Division, to see that it was appealable under the 19th section, and to see that if leave was necessary to appeal (of which at present I am not convinced), that leave was given in the present case.

I shall therefore humbly recommend your Lordships to declare that the Court of Appeal had jurisdiction to hear and to determine this appeal upon the merits; and to remit the case to the Court of Appeal with that declaration. But, looking to the fact that the Judges in the Court of Appeal were equally divided, and that therefore it was necessary to bring this case to your Lordships' House, and looking still more to the fact that the difficulty or doubt in the case appears to have been one rather pressed upon the Respondents in the Court of Appeal by the Court than

strenuously urged by themselves, I think I should ask your Lordships to say at the same time that there should be no costs on either side in respect of this appeal.

LORD PENZANCE:—

My Lords, I entirely agree with what has fallen from my noble and learned friend.

I confess that I feel inclined to base my judgment in this matter entirely upon the simple proposition that the *Judicature Act* says that there shall be an appeal from all judgments and orders of the High Court of Justice, and the interpretation clause of the Act says that a "rule" is an "order," and consequently the 19th section is to be read as if it included the word "rule." If there is to be an appeal from all rules and orders according to the words of the statute, it seems to me that it would require an overwhelmingly strong case to make out that any particular proceeding, which is of the character of the present, does not fall within that enactment.

Now, my Lords, the ground on which the supposed exception is placed is shortly this; that this is not a "rule" or "order" of the Court within the purview of the Act, because the function of the Court of Queen's Bench was, and that of the Queen's Bench Division in these matters is, a purely consultative one, that it is the giving of an opinion and not the making of a judicial order in the exercise of the ordinary jurisdiction of the Court. The cases which the learned counsel for the Appellants have brought before the House appear to me to establish conclusively that that is not a true view of the function which the Court of Queen's Bench before the *Judicature Act* discharged in respect of these cases. The cases are numerous to shew that the Court of Queen's Bench was in the habit of dealing with and reviewing these orders of an inferior Court upon the face of them, and if, upon the face of them, they were found insufficient, of quashing them. If they were not found insufficient then they would not be quashed, that is to say they would be affirmed. That was the function which the Court discharged, and it discharged that function at a time when the Courts of Quarter Sessions were still in the habit of consulting the Judges of Assize, as is shewn by the two cases that were cited by

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the learned counsel from *Burrow*. The practice was for the quarter sessions when they were in doubt upon a question of law to consult the Judge of Assize; but, notwithstanding that, the Court of Queen's Bench at that time exercised the same jurisdiction which it did up the time when the *Judicature Act* passed, of quashing any order of a Court of Quarter Sessions for any insufficiency which appeared upon the face of it. Of course until the Court of Quarter Sessions set out some facts upon the face of their orders, the Court of Queen's Bench could not interfere with them except upon matters of form; but whenever they did set out facts, and it is shewn that, I may say for centuries, the practice was to set them out whenever the justices at sessions had doubts, the Court of Queen's Bench dealt with the facts as they appeared upon the face of the order, pronounced the order sufficient or insufficient, and quashed it if the Court saw reason to do so.

Now the action of the Court of Queen's Bench in this matter cannot be considered consultative merely if the result of what was done was to make an order which dealt with the proceeding itself and put an end to the very order of the quarter sessions. If the action of the Judges of Queen's Bench in the matter was purely consultative, it would follow that they should remit in some form the result of that advice and consultation, to the Court of Quarter Sessions, and that the Court of Quarter Sessions should act upon it. But, as was well pointed out by the learned counsel for the Appellants, the *certiorari* itself bringing up the proceedings, independently of the order subsequently made upon it, put an end to all farther jurisdiction in the Court of Quarter Sessions to deal with the matter. Therefore the Judges of the Queen's Bench then had the proceeding before them and could either quash it or could let it stand; but the magistrates in quarter sessions were then *functi officio;* they could no longer deal with the matter either by way of affirming or of quashing the order.

It seems to me, therefore, my Lords, that it is abundantly made out that, according to the old practice of the Court, the function of the Court of Queen's Bench was that which has been argued for, namely, to consider an order of a Court of Quarter Sessions upon the face of it, and if the facts were stated upon the face of the order, to deal with them as they appeared upon those proceed-

ings and to apply the law to those facts, and then either to affirm the order or to quash it.

That being so, the question arises whether any change has been effected of late years which ought to lead to a different result as regards this appeal. Now from *Reg.* v. *Kesteven* (1), in which Lord *Denman* protested (2) against what had been done (as referred to in the case of *Reg.* v. *Sutton Coldfield* (3)), it does seem that, at first when attempts were made to vary this mode of proceeding, the Court of Queen's Bench repudiated accepting any function of the kind that that Court was asked to discharge. The Judges were asked to answer certain questions for the information of the parties, but they positively refused to do that, and said, No; our business is to say whether this order is a good one or a bad one; if it is good it must remain; if it is bad it must be quashed; but they held that the Court was not justified according to the practice in answering questions. Notwithstanding that, it seems that, in modern times, the practice has from time to time grown up, of putting before the Court something like an ordinary special case in an action, and of asking the Judges, in accordance with the findings on certain questions of fact, to give certain directions and remit the case to the Court of Quarter Sessions. And there is no doubt that the special case in this particular case does something of that kind. The petition at the end of the case is that "if the Court shall answer the first question in the affirmative, the order of quarter sessions is to be confirmed. If the Court shall answer the second, third, or fourth questions in the affirmative, the rate is to be remitted to the Court of Quarter Sessions to be amended in accordance with the opinion of the Court."

But, my Lords, although that is so, there is in this case, as I suppose there is also in those cases in which this sort of practice has grown up, an order of the Court of Quarter Sessions to begin with. Now, when ordinary special cases are submitted to the opinion of a Court of Common Law, the practice has never been that there is a judgment, and then a special case, and that in accordance with the opinion of the Court upon that special case,

(1) 3 Q. B. 810.
(2) Ibid. at p. 819; and see *Reg.* v. *Marton-cum-Grafton*, 10 Q. B. 971, at p. 975.
(3) Law Rep. 9 Q. B. 153, at p. 155.

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that judgment should be affirmed or set aside, but the parties always agree, after stating the facts, that if the Court should be of opinion one way, judgment shall be entered one way, and if the Court should be of opinion another way, judgment shall be entered otherwise. That is the form it assumes when the function is purely consultative. But here the case starts with an order formally made by the Court of Quarter Sessions. At the same time it is evidently, upon the face of it, intended by the parties to ask the Court to go out of the way of its proper legal jurisdiction and to give answers upon certain questions. Now I agree with my noble and learned friend, that when a case was brought up on *certiorari*, and when one of the parties had moved for and obtained a rule to shew cause why the order of the Court of Quarter Sessions should not be quashed, it would be quite competent to the Judges of the Court, if they thought, upon the face of the special case, and upon the facts therein stated, that the order was a bad one, to quash it, and they might do that although the parties may only have asked them to give certain directions to the Court of Quarter Sessions as to the way in which the sessions should deal with their order. Having before them the order made by the quarter sessions, and having before them the facts upon which that order was made, and coming to a legal conclusion that, upon those facts, the order was one that was contrary to law, it was perfectly competent to the Judges of the Court of Queen's Bench to do what those who applied to that Court for a rule asked that they should do, namely, to quash the order.

Under these circumstances, therefore, although some little difficulty has, I think, been introduced into the discussion of this case, by reason of the form in which the parties have endeavoured to obtain the opinion of the Court of Queen's Bench, I nevertheless think, looking at the nature of the proceeding, which is what this House has to deal with, that it is a proceeding in which the Court of Queen's Bench is asked to exercise its original function of quashing an order said not to be legally made; and consequently there is no more reason why this order or this rule should not be made the subject-matter of an appeal, than any other order or rule which the Court may make. Therefore, my Lords, I entirely agree with what my noble and learned friend has proposed.

LORD O'HAGAN:—

My Lords, I wish to be understood as basing my opinion upon, it seems to me, the plain meaning of the 19th section of the *Judicature Act* as applicable to the undisputed facts in this case. We have to consider a "rule" of Court, which, according to the interpretation clause of the Act, is to be held to be an "order." We have a section of that Act giving full jurisdiction to the Court of Appeal to review every judgment or "order," with certain specified exceptions, and I cannot discover any sufficient reason for thinking that the rule with which we have to deal was not a legitimate subject of appeal. I wish to rest my concurrence with the proposal of my noble and learned friend expressly upon that ground, because I am not satisfied that the 45th section can be safely relied on for the purpose of sustaining it.

The judgments of two of the learned Judges in the Court below have been founded on the view, that the character of the jurisdiction of the Court of Queen's Bench is consultative and not mandatory.

That Court has, as we all know,—we have heard many authorities cited on the point, perhaps unnecessarily,—a supreme control over inferior jurisdictions, and its general relation to such jurisdictions is certainly not consultative. It dictates and controls; it does not merely advise. No doubt, originally, the Court of Quarter Sessions, in cases such as that before us, made decisions from which there was no appeal; and I am not prepared to go with the argument that there has been such a change introduced through the *Judicature Act* as would justify us, under its provisions, in assuming the existence of an appellate authority, in cases of the kind. But there has been undoubtedly an established practice, so long existing as to forbid us now to call it in question, enabling the Court of Quarter Sessions to put itself in relation with the Court of Queen's Bench for the purpose of being directed and controlled as to its own action. It can state a case and require an answer; but, the answer given is authoritative and decisive. Here a case was duly stated, and when that was done the jurisdiction of the Queen's Bench attached upon the whole matter submitted to it. The power of the inferior Court was gone:—and the superior tribunal made its own ruling in the plenitude of

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its own powers, and enforced that ruling according to its own view of right and justice.

I observe, my Lords, that, in one of the judgments of the learned Judges, observations are made as to the necessity of avoiding an excessive increase of appeals in cases like that before the House, and making them "cheap and speedy," and not "dilatory, expensive, or burdensome." I approve the policy so indicated, very strongly; but we have only to discover the meaning of the Act, and if that be clear we have nothing to do with its policy. Besides, I cannot shut out from my consideration that it was manifestly designed not to limit appeals but to extend the power of making them. Criminal cases, orders by consent, orders as to costs, and orders whose finality is declared by statute, are excepted from the general operation of the 19th section; but in all other matters, orders or judgments are subject to revision by the Lords Justices. They have authority far wider than the Exchequer Chamber formerly possessed, and every day they deal with cases over which it would have had no control. If policy is to be considered, this indicates that the Legislature intended to enlarge the appellate jurisdiction, and I cannot see that we are at liberty to contravene that policy where it is carried out by clearly intelligible words.

My Lords, we are acting in our judicial and not in our legislative capacity; and we are not free to act on speculation or theory as to what law would be wisest or most desirable for the purpose of limiting the operation of provisions which appear to have a definite meaning and effect, in harmony with the general aims of the statute.

My Lords, what is there to sustain the statement that the proceeding here was of a consultative character? The distinction between what is consultative and what is magisterial and mandatory is illustrated by the many cases bearing on the old practice of the Courts of Quarter Sessions, when they consulted the Judges of Assize. When they were in doubt or difficulty, and desired information, they were in the habit of going to the assizes and asking for it, just as the foreman of a grand jury now seeks the assistance of the Court on the construction of an Act, or the settlement of a point of practice. But the Judges made no ruling. After the interpellation had taken place, and the advice had been received

by the Court of Quarter Sessions, it seems to have pronounced its own decision as of its own authority, and carried that decision into effect. The Judge's proceeding there was consultative. He did not order. The final decision was pronounced by the justices after asking his assistance and advice.

In *Ireland*, the Judges of Assize have an appellate jurisdiction in civil bill cases; and there, their decisions are final and conclusive. There they order, and do not merely give counsel. Their function is different from that formerly discharged by their English brethren; and is really analogous to that of the Queen's Bench.

The Judge in *Ireland* consults with no one; neither does the Queen's Bench. He makes no reference back to any one, and the Queen's Bench makes no such reference. In the one case, by statutable authority, orders are pronounced and effectuated; in the other the jurisdiction is at Common Law; but, in both, the proceeding is mandatory and decisive.

My Lords, if there had been nothing but the documents in the case I should find it difficult to hold, on a consideration of the terms of the *certiorari* and the orders before us, that the proceeding was in any sense consultative. The *certiorari*, after requiring the production of all deeds and documents, and so forth, concludes in these words: "That we may cause farther to be done thereon, what of right and according to the law and custom of *England* we shall see fit to be done." The writ goes, not to obtain the information which may ground an ineffective opinion or a friendly counsel, but to enable the Court to act, to act for itself, and to act conclusively on its own judgment as to what, according to the law and custom of *England*, it "shall see fit to be done." These words do not savour of consultation, and as little do the rules which follow upon the return. By the conditional rule, the prosecutors are peremptorily "ordered" to shew cause why the order of sessions should not be quashed, and the absolute rule, in like manner, "orders" that the decision of the sessions be affirmed or nullified. There is nothing of consultation or advice suggested by these documents. The "order" is absolute, and all people are bound and expected to obey it without, as I understand, any farther intervention from the quarter sessions. And obeyed it is accordingly. I find it stated by the Lord Chief Justice that "no

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instance has occurred in which the parties to the original order have failed to act on the decision of the Court of Queen's Bench:" and that statement has been repeated and confirmed at the Bar. The Court "orders" and the order is, in every case, respected.

I, as well as my noble and learned friends, was struck by the terms of the Special Case, and, certainly, some difficulty and confusion have arisen from them. That case, as it stands, has a consultative aspect, as it asks advice and not decision. But I ventured to suggest, in the course of the argument, that after the Special Case had been framed and put before the Court of Queen's Bench, the writ of *certiorari* issued on an order "by consent of counsel on both sides," and that the effect of such an order, so obtained, was to transfer all the proceedings from the one Court to the other, and, with the proceedings, the jurisdiction to deal with them: and that thereupon, without any reference to antecedent transactions, it became the right of the Court of Queen's Bench to act according to its own established practice, and to do what, in the words of the *certiorari*, it considered "just and fitting to be done." Thereafter, I concur with my noble and learned friend, it was quite immaterial to consider what were the terms of the Special Case, and how the parties by those terms had seemed to limit the operation of their demand upon the Court.

I am of opinion that the appeal should be allowed and the judgment reversed with costs.

Order of the 18*th of May,* 1878, *reversed: Declared that the Court of Appeal had jurisdiction to entertain, and ought to have entertained, the appeal from the rule or order of the Queen's Bench Division of the* 24*th of November,* 1877; *case remitted with this declaration to the Court of Appeal; no costs of this appeal on either side.*

Lords' Journals, 26th November, 1878.

Solicitors for the Appellants: *Sharpe, Parker, Pritchard, & Sharpe.*

Solicitor for the Respondents: *R. F. Roberts.*

[HOUSE OF LORDS.]

W. GREGORY DAWKINS . . . . . APPELLANT;

AND

THE RIGHT HON. BARON PENRHYN. . RESPONDENT.

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1878
Nov. 27.

Words to create a Trust—Statute of Limitations—Pleading.

A testator devised his estates to his son and his heirs male "in the fullest trust and confidence" that he would not do, nor permit to be done, "any act in law or otherwise" to defeat the thereinafter declared trusts and limitations of the estates, but that, on the contrary, he would do all in his power to effectuate them. He then declared how the estates were to go if the son died without issue of his body lawfully begotten, specifically devising one-fourth portion to *D.* The son having entered into possession of the devised estates, suffered a recovery:—

Held, that the words of the will did not create a trust, and that the entail was barred by the recovery.

Per LORD PENZANCE:—The right of a tenant in tail to enlarge his estate into a fee cannot be restricted by any expressions of a testator, the donor of the estate.

D. claimed, under a will executed in 1779, a certain estate, and the mesne profits accruing from the date when his father's title under that will first arose. The statement of claim itself set forth dates which shewed his grandfather's title to have first arisen in 1840, and his father's title, on the death of the grandfather, in 1852. His father died in 1864, and he alleged that he himself first knew of his own title in February, 1875. He asserted the existence of an express trust under the will. The Defendant put in a demurrer alleging that "the statement of claim was bad in law," denying that there was a trust so as to defeat the estates limited over on the death of the first tenant in tail without issue male, and it concluded with these words, "and on other grounds sufficient in law to sustain this demurrer":—

Held, that this last sentence was sufficient to raise the defence of the *Statute of Limitations.*

There is a distinction between the *Statute of Limitations* and the *Statute of Frauds.* The latter must be pleaded. The title to the estate, not the mere right to proceed for its recovery, is affected by the former. If the Plaintiff's statement of claim shews, on the face of it, that the time within which a title to land must be asserted has gone by, the defence of the *Statute of Limitations* may be raised on demurrer.

That defence was so raised without any distinct reference to the statute itself, and was *held* to be sufficient.

APPEAL against an order of the Court of Appeal affirming a decision of Vice-Chancellor *Malins* (1).

(1) 6 Ch. D. 318.

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The Appellant had brought an action against the Respondent to recover an estate under a devise, and in his statement of claim set forth the following facts:—

On the 25th of February, 1779, *John Pennant*, being seised of *Penrhyn Castle* and considerable estates belonging thereto, made his will, by which he gave his said estates to his son *Richard Pennant* (afterwards created Baron *Penrhyn*), and to the heirs of his body lawfully to be begotten, "upon special trust and confidence in his said son that in case he should leave no issue of his own body lawfully begotten, he his said son would not do or suffer any act in law or otherwise to obstruct or prevent the following devises, trusts, and limitations of the said testator's estates and plantations from taking effect; but, on the contrary, that he the said *Richard* would do or cause to be done every act in his power to establish or confirm the same." The will then gave the estates to certain persons upon trust for *George Hay Dawkins* (who afterwards took the surname of *Pennant*), the second son of his nephew *Henry Dawkins* (in the statement afterwards called *Henry Dawkins* the elder), or such other son of that person as should for the time being happen to be his second son, and *Edward Gregory Morant*, the second son of another nephew, "for and during the term of their respective lives, without impeachment of waste, to be equally divided between the said *G. H. D. Pennant* and the said *E. G. Morant*, share and share alike; and from and after the decease of the said *George Hay Dawkins*, &c., as to one full moiety thereof, &c.; and in case the said *George Hay Dawkins* should die leaving no issue male of his body lawfully begotten, then in trust for *Henry Dawkins* (afterwards called *Henry Dawkins* the younger), the third son of *Henry Dawkins* the elder, for his life without impeachment of waste; then in trust for the first son of *Henry Dawkins* the younger, and the heirs male of the body of such first son, with remainders over for default of issue."

The testator died in 1782. His son *Richard* (afterwards created Baron *Penrhyn* in the Irish Peerage) entered into possession of the estates, and immediately afterwards suffered a recovery of the said estates. He died in 1808, leaving no issue him surviving.

On the death of *Richard* Baron *Penrhyn*, *George Hay Dawkins*, the second son of *Henry Dawkins* the elder, took the name of

Pennant and entered into possession of the estates devised. *George Hay Dawkins Pennant* died in December, 1840, leaving no issue male of his body.

On his death *Henry Dawkins* the younger (the third son of *Henry Dawkins* the elder) became entitled as tenant for life to the said fourth part. He died in October, 1852, leaving *Henry Dawkins* (called *Henry Dawkins* the son), his eldest son and heir-at-law, him surviving, who thereupon became entitled as tenant in tail of the said fourth part. Paragraph 10 of the statement alleged that "The said *Henry Dawkins* the son, was at that date, and continued till his death to be, ignorant of his right to the possession or to the receipt of the rents and profits of the said fourth part of the said *Penrhyn Castle* and hereditaments." Paragraph 11. "The said *Henry Dawkins* the son died on the 13th of November, 1864, leaving the Plaintiff, his eldest son and heir-at-law, him surviving; and the Plaintiff thereupon became, and he still is, entitled as tenant in tail under the said will to the possession or the receipt of the rents and profits of the said one-fourth part of the said *Penrhyn Castle* and hereditaments."

Paragraph 12. "The Plaintiff was ignorant of the trust, or restriction on alienation, contained in the will of the testator until the month of February, 1875, when a copy of the will was found and handed to the Plaintiff. Prior to this date, viz., February, 1875, the Plaintiff had never heard or known that any such will had ever been made or executed by the testator, or that he the Plaintiff or his father, *Henry Dawkins* the son, or his grandfather called *Henry Dawkins* the younger, was, or had been, entitled to any share or interest in the property devised thereby, by virtue of any limitation therein contained or otherwise."

Paragraph 13. "The Defendant entered into possession upon the death of *George Hay Dawkins Pennant* and has since continued in such possession." Paragraph 14. "The Defendant claims to be entitled under the will of the said *G. H. D. Pennant*, and he claims that the said *George H. D. Pennant* acquired the fee simple and inheritance of the said fourth part under a devise thereof to him by *Richard* Baron *Penrhyn*, and that the said *Richard* Baron *Penrhyn* acquired the fee simple under and by virtue of a common recovery alleged to have been suffered by

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him in 1782. Paragraph 15. "The Plaintiff submits that any such recovery was invalid at law, or, at all events, in equity, to defeat the estates limited over in case the said *Richard Pennant* (Baron *Penrhyn*) should die leaving no issue of his body lawfully begotten, and that such estates have taken effect at law, or at all events in equity, and that the Plaintiff is now entitled as tenant to the possession or receipt of the rents and profits of the said undivided fourth part of the said *Penhryn Castle* and hereditaments."

The Plaintiff therefore prayed that the will of *John Pennant* might be established and a declaration made of the Plaintiff's right to the fourth part, and possession thereof delivered, and he also claimed £150,000 for mesne profits, and prayed for farther relief.

The Defendant demurred to the statement of claim on the ground that the alleged trust could not operate to prevent *Richard* Baron *Penrhyn* from suffering a recovery of the moiety of the hereditaments devised by the will, and that the recovery suffered in 1782 was valid in law and equity so as to defeat the estates limited over in case the said *Richard* Baron *Penrhyn* should die leaving no issue of his body lawfully begotten. The demurrer concluded thus, "and on other grounds sufficient in law to sustain this demurrer."

On the 6th of June, 1877, Vice-Chancellor *Malins* made an order allowing the demurrer and dismissing the claim, which order was affirmed on appeal. This appeal was then brought.

Mr. *Higgins*, Q.C., and Mr. *J. F. Oswald*, for the Appellant:—

The words of this will constitute an express trust, and therefore render the provisions of the 3 & 4 Will. 4, c. 27, inapplicable. The very word "trust" is used in the will to describe the duty of the first taker of the estate. But without that word the trust might be created: *The Attorney-General* v. *The Wax Chandlers Company* (1). In *Kennedy* v. *Daly* (2) there was, in a marriage settlement, an agreement, by a Papist, to convey to trustees lands for the purposes of the settlement, if he should become qualified to do so. By a change of the law he did become qualified, and

(1) Law Rep. 6 H. L. 1. (2) 1 Sch. & Lef. 355.

the agreement was treated as a trust, and a fine and non-claim by the trustee were held not to affect the right of the *cestui que trust.* In *Wright* v *Atkyns* (1) there was a devise to "*A.* and her heirs for ever, with the fullest confidence that after her decease she will devise it to my family." The words there were not nearly so strong as in this case, and the word "trust" was not employed, yet they were held to give *A.* only an estate for life and a trust for the heirs of the donor, as *personæ designatæ. In re Macleay* (2) recognised the same principle. *The Commissioners of Charitable Donations* v. *Wybrants* (3) decided that if the gift was express, as it certainly was here, and if the person taking the estate was bound to give effect to the gift, as he was here, it was an express trust. A legacy may be so charged on an estate as to take the character of a trust: *Thomson* v. *Eastwood* (4); and then the *Statute of Limitations* becomes inapplicable. In *Fleeming* v. *Howden* (5) Lord *Westbury* stated the broad principle (6) that "an obligation to do an act with respect to property creates a trust." The first taker of the estate here being without lawful issue, was really in the condition of a tenant for life, with a devise over at his death, and had no power to bar. In *Chamberlayne* v. *Chamberlayne* (7) there was a devise of freeholds to *A.* to hold to him and his heirs male for ever, but if he should die without leaving any son of his body, subject to the payment by *B.* of certain sums to *A.'s* daughters, and it was held that *A.* took only as the successor by a recovery. The estate was plainly given, the person to whom it was to go was designated, and the directions of the will ought to have been followed: *West* v. *Holmesdale* (8). *Cunningham* v. *Foot* (9) was not adverse to this Appellant; for there could be no doubt, on the very words of the will, that no trust was there created, and the whole purport of the will shewed that none could be implied. The principles declared in *Salter* v. *Cavanagh* (10) were clearly in favour of the Appellant. A direction to do a certain act, and to do it in a certain way, and, beyond that, not to do anything to defeat it, was imposed on the bene-

(1) 17 Ves. 255.
(2) Law Rep. 20 Eq. 186.
(3) 2 J. & Lat. 182.
(4) 2 App. Cas. 215.
(5) Law Rep. 1 H. L., Sc. 372.
(6) Law Rep. 1 H. L., Sc. at p. 383.
(7) 6 El. & Bl. 625.
(8) Law Rep. 4 H. L. 543.
(9) 3 App. Cas. 974.
(10) 1 D. & Wal. 668.

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ficiary under the will, and he was under an obligation to obey that direction in the form expressed, and was a trustee for that purpose: *West* v. *Holmsdale* (1).

As to the suffering of a recovery. In the first place, the first taker of the estate had no right to suffer one; not only because under the terms of the will he was not properly a tenant in tail, but also because by the express terms of the will he was forbidden to do "any act in law or otherwise" that could affect the trusts and limitations of the will. And in the next it is denied that there is here any sufficient allegation that a recovery had been suffered. In *White* v. *Smale* (2), in a bill brought against *B.* and *C.*, the Plaintiff stated a circumstance which was material to charge *C.*, not positively as a fact, but as an allegation made by *B.*, and a demurrer by *C.* was on that ground allowed. That case is directly applicable to the statement here. *Mainwaring* v. *Baxter* (3) is no authority here, for in that case the whole scheme was held to be a trick to defeat the law against a perpetuity, and was therefore overruled by the Court.

As to the *Statute of Limitations* itself. The defence on account of that statute must be pleaded. In *Aggas* v. *Pickerell* (4), Lord *Hardwicke* had refused to admit such a defence on a demurrer. The statute does not directly apply to equitable rights such as are the foundation of the claim here, and at law it is well settled by practice and by decisions that it cannot be taken advantage of but by pleading, even though on the face of the declaration it should appear that the debt claimed by the Plaintiff had accrued twenty years before action brought: *Lee* v. *Rogers* (5); *Williams' Saunders* (6). Even the most modern practice introduced by the Judicature Acts, and the Orders and Rules under them, contained nothing contrary to this rule of pleading, but required that a substantive defence, such as that of the *Statute of Limitations*, which does not deny the cause of action, but only asserts that the remedy has been taken away, should be pleaded (7). And in

(1) Law Rep. 4 H. L. 543.
(2) 22 Beav. 72.
(3) 5 Ves. 458.
(4) 3 Atk. 225.
(5) 1 Lev. 110.
(6) 2 Wms. Saund. 63 b. See also 1 Wms. Saund. 282, n. 2; 2 Wms. Saund. 626, n. 6; *Chitty* on Pleading, Vol. i. p. 506, n. (s); Vol. iii. pp. 126–172.
(7) *Judicature Act*, 1875, Order XIX. rule 18; Order XXVIII. rule 3.

Catling v. *King* (1), with regard to another statutory defence, that of the *Statute of Frauds*, it was held that the defence of the *Statute of Frauds* cannot now be raised on demurrer. And though in *Wood* v. *Midgley* (2) that defence had at one time been allowed to be so raised, it was to be observed that the demurrer there distinctly, in terms, set up the statute, and alleged that the agreement sought to be enforced was not made in the manner "lawfully authorized by the *Statute of Frauds*." Here there is no reference whatever, in the demurrer, to the *Statute of Limitations*. Now the Order XXVIII., rule 2, requires that the nature of the defence should be stated, and *Catling* v. *King* (1) is a clear authority that this defence cannot now be raised by demurrer. The defences on the two statutes are precisely similar in their nature—they both admit the existence of a cause of action, but both assert that there is a matter of law that prevents the action from being maintained. To each there may be answers in fact and in law, and the Plaintiff ought not in any case to be taken by surprise by a demurrer which does not specify the nature of the defence, and so deprives him of the chance of replying to it.

Mr. *Southgate*, Q.C., and Mr. *Joshua Williams*, Q.C. (Mr. *Dart* and Mr. *W. Barber* were with them), for the Respondents, were not called on to address the House.

THE LORD CHANCELLOR (Earl *Cairns*):—

My Lords, this case has been very frequently described by the learned counsel for the Appellant as a "very important case." I infer that the amount of property sought to be recovered is considerable, and therefore no doubt it would be a matter of importance for the Appellant to recover that property, and I daresay a matter of importance to the Respondent to lose it. In that sense the case may, no doubt, be an important case; but if it is meant that the case is a case of importance as involving a legal question of nicety or difficulty, I cannot agree with that description of it. It appears to me to be one of the clearest cases which ever was presented for the decision of a Court.

Now, my Lords, in the first place it is objected that the decision

(1) 5 Ch. D. 660. (2) 5 De G. Mac. & Gord. 41.

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has been given upon demurrer on the ground of what is called the *Statute of Limitations*, although the demurrer only mentioned another ground. No doubt that is so; but with regard to the statements in the bill, I understand them to be clear and distinct, and indeed it has not been argued that there is anything ambiguous or doubtful in the statements upon the bill so far as the *Statute of Limitations* is concerned. The bill states in substance that the Plaintiff has not been in possession or receipt of the rents of the property he seeks to recover within twenty years, and in truth there can be no doubt about that, because he goes on to say that he did not know he was entitled to them, therefore he could not have been in receipt of them, or in possession. So far, therefore, as the fact is concerned, it is averred distinctly in the bill. It is also perfectly clear that the pleader had before his mind the difficulty raised by the *Statute of Limitations*, because he endeavours to obviate the conclusion of law which would follow from the fact that he was not in possession within twenty years by statements intended to raise the question of a direct trust, which I will afterwards deal with. He, therefore, had distinctly before his mind the difficulty arising from the *Statute of Limitations*.

In that state of things a demurrer was put in, a demurrer which, so far as regards the expression of the ground, mentioned another ground of demurrer; but the law always has been, and the law continues to be, that in addition to a specified ground of demurrer you may, at the Bar, allege any other ground of demurrer which appears upon the face of the bill. The point, therefore, came in the argument before your Lordships to this: it was contended on the part of the Appellant that, whether you specified your ground of demurrer or not, you could not now demur, by reason of the *Statute of Limitations* applicable to real property.

My Lords, I conceive that there can be, and ought to be, no doubt at all upon that point. The analogy which was referred to of the *Statute of Frauds* is not an analogy of any weight. The *Statute of Frauds* must be pleaded, because it never can be predicated beforehand that a Defendant who may shelter himself under the *Statute of Frauds*, desires to do so. He may, if it be a question of an agreement, confess the agreement, and then the *Statute of Frauds* will be inapplicable. With regard also to the

Statute of Limitations as to personal actions, the cause of action may remain even although six years have passed. It cannot be predicated that the Defendant will appeal to the *Statute of Limitations* for his protection; many people, or some people at all events, do not do so; therefore you must wait to hear from the Defendant whether he desires to avail himself of the defence of the *Statute of Limitations* or not. But with regard to real property it is a question of title. The Plaintiff has to state his title, the title upon which he means to rely, and the *Statute of Limitations* with regard to real property says that when the time has expired within which an entry or a claim must be made to real property, the title shall be extinguished and pass away from him who might have had it to the person who otherwise has the title by possession, or in whatever other way he may have it. Therefore, if upon the face of the bill the Plaintiff states that the period allowed by the statute has expired, he states in law that his title is extinguished, unless indeed he can bring himself within some of the exceptions under which the statute allows his title to continue. It is therefore clearly a case in which a demurrer where the facts appear upon the bill is applicable as a mode of defence, and I repeat that there could have been no surprise in this case, because it is obvious upon the face of the claim itself, that the Plaintiff felt the difficulty by reason of the *Statute of Limitations*.

My Lords, I pass therefore from the argument upon the technicality that the defence was not properly raised. In my opinion it was properly raised.

I now turn to that which is said to get rid of the difficulty of the *Statute of Limitations*, and if that to which I am about to refer does not get rid of the statute, the statute remains a fatal impediment in the way of the Plaintiff. Now, what is said to get rid of the statute is this; it is said that there is here in the devise, which is the root of the title for this purpose, a devise in the will of *John Pennant*, the testator, which is an express trust, and that the 25th section, therefore, of the *Statute of Limitations*, which deals with the case of an express trust, prevents the statute running. The 25th section is this, "That when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a

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suit against the trustee or any person claiming through him, to recover such land or rent shall be deemed to have first accrued," when there has been a conveyance, "to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him." You must therefore have a trustee, a *cestui que trust*, and an express trust.

Now let us see whether there is here an express trust. What the will says is this: there is a devise to *Richard Pennant* and to the heirs of "his body lawfully to be begotten," which would create an estate tail, "but upon special trust and confidence in my said son that in case he shall have no issue of his own body lawfully begotten that he" "will not do or suffer to be done any act in law or otherwise to obstruct or prevent the several following devises, trusts, and limitations of" the testator's "estates and plantations from taking effect, but on the contrary that he will do or cause to be done every act in his power to establish and confirm the same;" and then, in case he dies without lawful issue, there are devises over, under one of which it is said that the Plaintiff would ultimately become entitled.

Now with regard, in the first place, to this being an express trust, I am of opinion that it is not an express trust at all. I do not for a moment mean to say that you may not have a trust of an estate tail. I can conceive, although it would be a strange and unusual mode of conveyancing, a conveyance or a devise to a man and the heirs of his body in trust for *A. B.*, and his heirs; and then the estate tail would be held in trust for *A. B.*, and *A. B.* could call upon the tenant in tail, I daresay, to bar the estate tail and to enlarge it into a fee for his benefit. That would be an express trust, and there would there be a trustee and a *cestui que trust*. But although I find the words here, "special trust and confidence," taking the whole of the sentence, it really is not a special trust at all, but an injunction against barring the estate tail; a direction if you like, an injunction if you like, an expression of confidence if you like, an expression of trust if you like, but all centring in this, that the estate tail is not to be barred. But that cannot be done; you cannot give a man an estate tail and express your confidence that he will not bar it; you cannot

give a man an estate tail and say, I lay it upon you as a trust upon your conscience that you shall not bar your estate tail. The law does not permit that to be done. It is therefore playing with words to say that there is here anything of an express trust; as an express trust is meant to express the relationship between a trustee and a *cestui que trust*.

But, my Lords, let me go a little farther. What about a trustee? If there is a trustee, it is the devisee, *Richard Pennant* Baron *Penrhyn*. The devisee, *Richard Pennant* Baron *Penrhyn*, had an estate to him and the heirs of his body, and that which is called a "trust and confidence" was a trust and confidence that he would not do or suffer anything to obstruct the subsequent limitations over taking effect. Therefore, if there be a trust (which I have already denied) he, and he only, is the trustee, or, if you like, he and the heirs of his body; and when they came to an end in 1808, the trustee upon whom the injunction was laid came to an end also. There was no person else who could have barred the entail or prevented the limitations over taking effect, and the trust, therefore, could only be co-extensive with that period during which the thing which was deprecated, and desired not to be done, could have been done.

But the matter does not stop there. When *Richard* Baron *Penrhyn* died in 1808 without issue the estate tail came to an end. The claim avers that thereupon *George Hay Dawkins* who, for the purpose of the present controversy, is the only person we have to look to, entered into possession and continued in possession until 1840. But he was the person in remainder after the estate tail, and if the estate tail was not barred, he was the person rightfully to succeed to the estate in remainder. Now the Plaintiff is in this dilemma; he must either say that the estate tail was barred by *Richard* Lord *Penrhyn*, or that it was not. I understand that in the Court below he desired to say that it was not barred, but he may have his choice; it must be one way or the other; either the estate tail was barred by the tenant in tail, or it was not. Now let us suppose that it was barred; if the estate tail was barred by *Richard* Lord *Penrhyn*, then the prohibition against barring being invalid, an estate in fee simple was created absolutely, discharged from every claim upon that estate. But if, on

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the other hand, the estate tail was not barred by *Richard* Lord *Penrhyn*, then the entry by *George Hay Dawkins* was an entry as in remainder, and the thing which the testator had begged and entreated might not be done, was not done. The estate tail was out of the way, the remainders would take effect and there was nothing to prevent, in the rightful course of those remainders, the Plaintiff entering into possession if he was entitled so to do.

Therefore there appears to me here every possible impediment in the way of the Appellant. There was, in my judgment, no express trust, there was in my opinion no trustee, and there was not, I think, any person who could be called a *cestui que trust.* The Plaintiff either is barred by the circumstance that a recovery was suffered, if a recovery was suffered, or if a recovery was not suffered, there was nothing to prevent all the limitations in the will taking effect in their natural order, and there is nothing, therefore, in the averments of the Plaintiff to shew any reason why at the time he was entitled to possession he did not claim and enter into that possession. The case, therefore, seems to me to be free from any kind of doubt or ambiguity.

The only other observation I have to make is with regard to the question of leave to amend. I gather that no leave was asked in the Court below, and I am not surprised at that, because it is quite clear that, even now, no suggestion can be made, much less could any evidence be given that anything could be introduced into this bill by way of amendment which would in the slightest degree alter the case of the Plaintiff. I think it is the only thing we can look upon with satisfaction in the case, that more money has not been thrown away by a more elaborate litigation which, as it appears to me, must have ended, as this must end, in the defeat of the Appellant's claim.

I therefore move your Lordships that the appeal be dismissed with costs.

LORD PENZANCE:—

My Lords, I entirely agree in the opinion which has been just now expressed to the House. I think that the case upon the merits has been so fully explained in the judgments of the Court below and by my noble and learned friend that I should add

nothing to it in point of clearness if I were to go over the ground again.

The Plaintiff really is barred by the *Statute of Limitations*. The events which have occurred, and the time which has elapsed, place it beyond doubt that he is barred by the *Statute of Limitations*, unless he can shew that which he has attempted to shew, namely, that the *Statute of Limitations* does not apply in this case, because in the original devise there was an express trust created. Now, my Lords, with reference to the creation of that trust I agree with what has just been said. I have the greatest possible difficulty in comprehending how language of the character which is here used, can be construed into the creation of what is commonly called a trust, because it appears to me to be lacking in the elements of a trust. I have some difficulty in seeing that there was any *cestui que trust;* or that there were any persons who could properly be called trustees. The language of the will, no doubt, includes within it the word "trust," but if the language had been otherwise, the meaning would have been precisely the same. If instead of saying that it was upon "the special trust and confidence" that in a certain event the estate tail should not be barred, the testator had said, "I forbid," or "I interdict the devisee from barring the estate tail," no question about trust could possibly have entered into anybody's mind. The mere use therefore of the word "trust," in the absence of those elements which belong to a trust, appears to me to fail in creating a trust.

My Lords, this question has been considered really in every aspect, and I would call your Lordships' attention to the way in which it has been put by the learned Master of the Rolls. He says: "The way to try it is this: suppose instead of the words that are after 'upon special trust and confidence,' I had got these words, 'but upon special trust and confidence in his said son that in case he should have no issue of his own body (for that is what it means) he should convey the estate to *John Smith*,' could any one doubt then that the estate to *John Smith* was after the estate tail? If it is after the estate tail, whether it is in defeasance of the estate tail, or whether it is in remainder after the estate tail, it is liable to be destroyed by the tenant in tail suffering a recovery before the passing of the Act for the abolition of fines and

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recoveries, or by now executing a disentailing deed. In other words, the right of the actual tenant in tail to enlarge his estate to a fee simple, cannot be restricted by any attempt on the part of the settlor or testator by inserting clauses either that he shall not exercise the right or by defeating the estate tail in case he exercises the right." Now my Lords, I conceive that that is unanswerable. This clause, whichever way it is looked at, really is nothing more or less than an interdict upon barring the estate tail, an interdict which is contrary to the law.

So much, my Lords, upon the merits of the case. But it has been said that this matter has not upon the pleadings been treated in a way to do justice to the Plaintiff; it is said that the defence cannot be raised upon demurrer. I think the analogy drawn from cases in which the *Statute of Limitations* is applicable to debts at Common Law is an analogy that fails, for the reason which has just now been mentioned to the House. The *Statute of Limitations* as applied to debts is a statute that does not put an end to the debt, it merely prevents the remedies; and it may be taken advantage of, or it may not be taken advantage of, according to the volition of the Defendant. But the *Statute of Limitations* applying to real property, as has been pointed out, does more than that; it goes to the root of the Plaintiff's claim. As the learned Master of the Rolls said, "in that case it is not a bar of the claim, it is a divesting of title, or a transference of title to somebody else. If, therefore, it appears on the face of the claim that the title which once was in the claimant has passed to somebody else, that is a good ground for demurrer." That, again, I think seems unanswerable. If the result of the statute is, that, upon the face of the claim as stated, the title is no longer in the Plaintiff, surely that is a matter which may be raised by demurrer.

But then—and this is the part of the case which I listened to with anxiety to see whether one could with certainty feel that justice had been done—it was said, "But the demurrer itself when it came did not give the Plaintiff any idea that this point as to the *Statute of Limitations* was about to be raised." Now, my Lords, upon that I was, as I say, anxious to hear what could be said most fully, because if I were of opinion for a moment that the Plaintiff had been placed at an unfair disadvantage, I for one should not

be prepared to affirm this judgment. But I cannot see that that is so. I do see upon the face of the claim indications that the learned counsel who prepared the claim on the part of the claimant evidently had in his mind the *Statute of Limitations*, because he stated matters which had no relevancy whatever unless they were intended to apply to the defence of the *Statute of Limitations*. I allude to the statement that the Plaintiff was ignorant of the existence of the will, and some other matters which are stated.

But a complete answer as it seems to me to this matter of complaint after all lies in this, that when the case came to be argued in the Court below and when, as the Plaintiff would say, this defence of the *Statute of Limitations* was sprung upon him unawares, the natural and inevitable thing to do, supposing that he had any answer to that defence, supposing that he was able to put forward any circumstances which would relieve him from the operation of the statute, would have been for his counsel to say that they desired to amend their claim, that they were not aware that the *Statute of Limitations* would be pressed against them, that the demurrer had given them no notice of it, and that upon leave being given to them to amend their claim they could state facts which would entirely relieve them from the pressure of the statute. It appears to me that no learned counsel, certainly not the two able counsel by whom the claimant was represented in this case, would have failed to take that step, if the Plaintiff was able to state such facts. And even at the Bar of this House, although I have heard a great deal about the injustice done to the Plaintiff by this demurrer, I have not heard it stated that there are any facts which would take the case out of the statute.

Under those circumstances, my Lords, I am satisfied that the judgment of the Court below ought to be affirmed.

LORD O'HAGAN:—

My Lords, I am quite of the same opinion. This was a very hopeless case from the starting point. It has been presented to us by Mr. *Higgins* and his learned colleague with all the ability that could have been applied to it: but they have failed, at all events so far as I am concerned, to make any impression either as to the matter of practice, or as to the matter of law.

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First, as to the matter of practice, I felt, with my noble and learned friend who has just addressed the House, that if there had been any oversight on the part of counsel or any mistake on the part of the Court, it would behove us to take every means within our power of rectifying a possible error, and putting the case in train for full and satisfactory discussion.

But, having attended very carefully to the elaborate argument we have heard, I cannot say that, on the first point, I entertain a doubt. Under any circumstances, I should have much hesitation in differing from the learned Judges of the Courts of first instance, who have habitually to deal with practice questions. But I do not see sufficient ground for disputing the perfect correctness of their unanimous decision.

As to the cases in Courts of Law (in the Courts of Equity we have had no reference to analogous cases) I do not think that they have any real bearing on that before us. Amongst those cases, when I was familiar with them at the Bar, there could hardly have been one, within ordinary experience, in which the *Statute of Limitations* could have been effectually raised upon demurrer. The immateriality of the statement of time and the use of the videlicet made its application generally impossible, and necessitated the raising of the defence by plea; and, although my noble and learned friend was right in saying that a case could be imagined in which, from the narrative of the facts, you might properly infer that there had been such a condition of things as would raise that defence, yet such a case scarcely ever occurred or could occur. It is also to be observed, as was mentioned by my noble and learned friend on the woolsack, that, at law, the pleading of the statute, in order to shew the suspension of liability, was a matter of discretion and of choice. It was quite a different thing from pleading it, with reference to real property, where it would operate as a complete transfer of title from one person to another, and as an absolute extinction of a right.

Then, my Lords, we have been pressed very much upon the ground of surprise. It has been urged, that an improper advantage may have been taken of the general mode of raising the question by demurrer, and that the Court ought not to have permitted this. As I have intimated, if I thought such advantage

had been taken, or could have been taken, I should readily concur in any amendment which might accomplish full justice between the parties. But, in the first place, it is to be observed that what has been done in this case was strictly in accordance with the practice as established under the *Judicature Act*. The counsel for the Appellant referred to the 3rd rule under Order XXVIII., but the 2nd rule says this: "A demurrer shall state specifically whether it is to the whole or to a part, and if so, to what part, of the pleading of the opposite party. It shall state some ground in law for the demurrer, but the party demurring shall not, on the argument of the demurrer, be limited to the ground so stated." We are all, I take it, quite aware that that is a re-statement of the practice as it prevailed up to the time of the passing of the Act.

The pleader for the Respondent specified one ground of demurrer, and added that there were others which would be relied upon at the Bar. The one ground, with reference to the suffering of a recovery, has failed the Defendant: but the others remain, and one of them is that upon which the Courts below have unanimously acted.

That being the state of the law, my Lords, let us see whether, as a matter of fact, there was any surprise in this case. In my opinion, there was none. Anybody who reads the claim will see that it was elaborately and carefully drawn, with a view to the very point on which the Respondent has succeeded: and no one of common sense and legal experience could have failed to expect, from the statement of such facts as are presented upon the face of it, that the defence of the statute would be raised. Those facts were sufficient to found that defence, and the raising of it must have been, and undoubtedly was, anticipated.

The learned counsel who settled the statement of claim properly acted on the anticipation, and relied on such grounds as he could suggest to encounter the Defendant's case, by averring ignorance of the rights of the Plaintiff and those under whom he derived, and the existence of an express trust; and nothing farther has been urged by the Appellant in the Courts below, or at the Bar of your Lordships' House. The question was asked, whether any additional reply to the Respondent's contention could be offered, which might support those already open on the pleadings as they

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stand? But we were not informed of the existence of any, save, indeed, that one of the learned counsel threw out, hypothetically, that one of the parties through whom the title had devolved might have been abroad for a considerable number of years.

And then, my Lords, if there had been,—as we have no reason to suppose,—any additional facts which could have helped the Plaintiff, we are entitled to ask,—"Did he apply to the Court below for leave to amend?" It was competent to that Court fully to protect him, and to say that, having been taken by surprise on the argument of the demurrer, he should suffer no injustice from the effect of that surprise. And we cannot doubt that, if a reasonable case had been made upon affidavit, or otherwise, the Plaintiff would have been allowed to amend his claim so as to put forward anything which might avail for his protection. But no such case was made; there was no application for liberty to amend: and, in my opinion, there is no ground for complaint as to any surprise which could have wrought the least injustice.

My Lords, having said so much on the matter of practice and the conduct of the case. I need add little as to the substantial defence of the Respondent, and the mode in which the Plaintiff meets it. They have been already dealt with, very clearly and satisfactorily. The case really resolves itself into a single point on the one side and a single point on the other. The demurrer raised a question with reference to the recovery. But that, for reasons which I need not detail, need not be considered now. The one point of the Respondent is rested on the operation of the *Statute of Limitations*, and the answer of the Appellant is that there was an express trust preventing its operation. If there was not such a trust the statute plainly bars the Plaintiff's claim; and in my judgment there was not. The word "trust" is used by the testator, but the mere use of that word does not make a trust in any legal or equitable sense. For that purpose, as the Lord Chancellor has said, you must have a trustee; you must have a *cestui que trust;* you must have some fiduciary relation. But there is nothing of that sort here. There is an expression of "special trust and confidence" that the son of the testator will not do a certain thing. There is the intimation of a hope that that thing may not be done. There is, if you please, a mandate not to do it, but there is no more. There is no creation of a

fiduciary relation between the devisee and anybody else; and I cannot see that any one can properly be regarded as a *cestui que trust*, although if the confidence of the testator had been justified in the event, as it was not, the estate tail would have been maintained according to his wish, and persons undesignated, and then unborn, would have had the benefit of it.

The provision on which the Appellant relies, in my opinion, created no trust available to him: and if it had aimed at that object, and, by words sufficient to create it in other circumstances, the purpose of the trust would have been to do that which the law says shall not be done. The testator gives, in the first instance, an estate tail. To that estate tail, when given, certain incidents are attached, and it is not competent for a man who has created such an estate to take away those incidents. One of them is, that the person to whom the estate tail is given shall have certain powers operating with certain consequences, and you cannot, in defeasance of the estate, take away these powers, or forbid their exercise. Even if there had been a trust, as the Appellant alleges, it would be tainted with illegality by the purpose of the testator to nullify the action of the law, and could not have been made legally available to prevent the bar of the statute. The matter is very clearly put by one of the learned Judges in the Court below (Lord Justice *James*) in this way: "Now, if there is one thing that has been settled beyond all question in the real property law of this country, it is that no condition, no restriction, no prohibition, nothing, can prevent a tenant in tail from suffering a common recovery with all the consequences of that common recovery; and it appears to me to be perfectly immaterial whether the conveyancer uses one form of words or another." I am quite of that opinion, and therefore, my Lords, upon the substance of the case, as well as upon the matter of practice, I entirely concur with the Lord Chancellor, and think that this appeal should be dismissed.

Order appealed against affirmed; and appeal dismissed, with costs.

Lords' Journals, 27th November, 1878.

Solicitors for Appellant: *Guscotte, Wadham, & Daw.*
Solicitor for Respondent: *Charles Frederick Hore.*

[HOUSE OF LORDS.]

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EBENEZER SWINTON . . . . . APPELLANT;

AND

REBECCA BAILEY AND OTHERS . . . . RESPONDENTS.

Will—Revocation of "Clause" in a Will.

J. E. made a will in which he devised his house, lands, and tenements to his mother, "*Elizabeth E.*, her heirs and assigns, for ever;" he afterwards struck his pen through the words, "her heirs and assigns for ever":—

Held, that this was, under the 6th section of the *Statute of Frauds* (29 Car. 2, c. 3), a valid revocation, by obliteration, of a clause in his will; the mother took only an estate for life.

The 6th section of the statute was satisfied by this act of obliteration of the words in question, which amounted to an actual revocation, and not a mere alteration.

The word "clause" in the first portion of the section may properly be read "part."

Per LORD PENZANCE:—"Devise" in the statute means a disposition of lands, in writing, and when the statute says the testator may revoke any "clause thereof," it means any intelligible portion of the devise, whether the effect is to increase the beneficial interest of the taker, or the reverse.

THIS was an appeal against a decision of the Court of Appeal, which had reversed a previous judgment of the Exchequer Division.

On the 16th of November, 1826, one *Joseph Ely* (or *Eley*), of the county of *Lincoln*, made his will, which recited that he was seised in fee simple of certain land in the parish of *Kyme* in that county, and that he was desirous in case of his death to make a provision for his mother, *Elizabeth Ely*, and he gave the said lands, &c., to his mother "to hold unto her, the said *Elizabeth Ely*, her heirs and assigns for ever." He bequeathed to her also his personal property, and made her his executrix. The will was attested by three witnesses, and the attestation clause formally noticed two interlineations—the word "simple" after the word "fee," and the word "other" in the clause revoking all *other* wills. There was, however, an obliteration which the attestation clause did not notice. In the body of the will the following words in the gift to the mother "*Ely*, her heirs and assigns for ever," had been struck through

with a pen, but the obliteration being more extensive than was intended, the word "*Ely*" had been re-introduced, and the gift read thus, "to hold to my said mother *Elizabeth Ely*," the other words continuing obliterated. The testator died in April, 1836, and his mother proved the will. There was no direct evidence relating to the making of the obliterations. But when the will was propounded for probate, on the 17th of June, 1836, *Elizabeth Ely* made an affidavit, stating that on the death of the testator she made search for the will and found it, and observed the erasures, and she swore that the will as then produced was in the same state as when she found it. Probate was granted to her, and she entered into possession of the property. On the 14th of December, 1853, she made a will devising all her real estate whatsoever and wheresoever to her nephew *Jacob Swinton* (the father of the Appellant) in fee simple. *Elizabeth Ely* died on the 11th of October, 1859, and on the 14th of November, 1859, the Respondents (claiming as co-heiresses-at-law of *Joseph Ely*) brought an action of ejectment against *Jacob Swinton* to recover possession of the premises. He at first defended the action, but then withdrew, and the Plaintiffs in the action had possession delivered to them. On the 1st of February, 1875, the present Appellant, as the heir-at-law of the devisee *Jacob Swinton*, brought ejectment against the present Respondents to recover possession. The cause was tried on the 17th of March, 1875, before Mr. Justice *Brett* without a jury. A verdict was entered for the now Respondents, but leave was reserved to the Appellant to move to enter it for him. A rule was accordingly obtained, and on the 18th of November, 1875, judgment in the Exchequer was delivered in favour of the Appellant. The case was taken to the Court of Appeal, and on the 2nd of February, 1876, that judgment was reversed (1). This appeal was then brought. In consequence of proceedings in the Court below, it was here taken as established that the alterations and erasures had been made by the testator himself.

Mr. *Benjamin*, Q.C., and Mr. *T. R. Bennett* (Mr. *Biale* was with them), for the Appellant:—

The question here depends on the construction to be put on the

(1) 1 Ex. D. 110.

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6th section of the *Statute of Frauds* (1), and that question is whether what had been done could be said to be a revocation, by obliteration, of a "devise" in a will, or of a "clause" of a devise. It is submitted that there was no such revocation. The statute meant to insure accuracy in all that was done with regard to wills, and therefore required them to be executed in a particular manner, and, if an alteration was to be made in their provisions, required that the alteration should be made with the same care and formalities that had been observed with regard to the execution of the will itself. If a man determined to revoke his will, he might do so in any one of the ways described in the statute, by cancelling the will, by tearing it up, or by obliterating a devise in it, or even a clause in any devise. Obliteration was a clear and intelligible act as applied to a devise. But nothing that had been done here came within any one of the descriptions in the statute. The words in the section were precise, a "devise" or a "clause" of a devise. Now here the devise had not been revoked, the devise to the testator's mother remained, as it had been originally made. Then had a clause of that devise been revoked? Certainly not. The words obliterated did not form a clause of the devise, but were only qualifying words attached to it, shewing the nature of the estate she was to have in the land devised. If they effected any purpose at all, they only effected an alteration in the quality of the thing devised, and then they required to be formally attested in the way in which the will itself had been attested. Not being so attested, they had no effect whatever, and the will remained as before. The statute did not allow the interest of the devisee to be increased except by an alteration of the will properly attested. Nor did it allow the interest to be diminished except the alteration was attested in the same manner. In the Court

(1) 29 Car. 2, c. 3, s. 6: "No *devise* in writing of lands, tenements, or hereditaments, *nor any clause thereof*, shall at any time after, &c., be revocable otherwise than by some other will or codicil in writing, declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence and by his direction and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated by the testator or by his directions in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses declaring the same, any former law or usage to the contrary notwithstanding."

below, the importance of the technical and precise word "clause" had been disregarded, and the vague and indefinite word "part" had been put as its equivalent. But so to construe the clause was to defeat the very object of the statute, which allowed the obliteration of a devise or a clause of a devise, but did not allow the alteration of it except as attended with certain specified formalities. If a man devised *Blackacre* and *Whiteacre* to *A.*, and then obliterated the devise of *Whiteacre*, there would be a revocation as to *Whiteacre*, but the devise to *Blackacre* would remain as before, for the two devises were distinct things, and each was complete in itself. But as to *Whiteacre*, that would be the obliteration of a "clause" of the original devise, and so would satisfy the words of the statute. The obliteration would be complete in itself, it would be so far a revocation; but an alteration as to the quality of the thing devised would not be a revocation, and would not fall within the words of the statute. In *Locke* v. *James* (1) the testator gave an estate charged with £600 payable to his daughter. He afterwards altered that sum to £200, and added a written declaration that the annuity was to be £200. That was an alteration of the thing devised, a substitution of one thing for another, and not being properly attested was held to be ineffectual. *Ex parte Ilchester* (2) had recognised the same principle, and it was applied in *Winsor* v. *Pratt* (3). In *Short* v. *Smith* (4) the intention of the testator was not to revoke a devise, but to change the trustees, and Lord *Ellenborough* said (5) that it would be unreasonable to construe such a purpose as a revocation of the will itself, but it was a complete revocation as to the trustees. So in *Larkins* v. *Larkins* (6) the devise was to three trustees—the devise to one of them had been obliterated—that was not a mere alteration of the will; it was a clear revocation of the devise to the one trustee; it was complete in itself, and so was within the words of the statute. Had it been, as it was here, a mere alteration of the interest given, being unattested, it would have been ineffectual.

Mr. *Wills*, Q.C., and Mr. *Mellor*, Q.C. (Mr. *Dunning* was with them), for the Respondents:—

The obliteration here was, under the statute, a declaration of

(1) 11 M. & W. 901.
(2) 7 Ves. 348.
(3) 2 B. & B. 650.
(4) 4 East, 419.
(5) Ibid. 429.
(6) 3 B. & P. 16–109.

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the intention of the testator to revoke the gift of a fee simple estate to his mother. Suppose there had been, first, a devise to *Elizabeth Ely*—and then the words—"and after her decease to her heirs and assigns for ever." The Appellant could hardly have denied that two devises would have been made. If so, then the obliteration of the latter words must have amounted to the revocation of a devise, or a clause in a devise. It was the same here. It was not a mere alteration qualifying the gift, but a real and substantial revocation of a devise of a fee simple estate—an estate equal to that which he recited himself to possess. He had at first given such an estate; he changed his intention, and he revoked the gift. He revoked it by obliteration, which he could do in accordance with the very words of the statute: *Jarman* on Wills (1). Here words were struck out; there was no mere alteration, but a positive revocation by obliterating that which had been given, and the whole will shewed that this had been the intention of the testator.

Mr. *Benjamin* replied.

THE LORD CHANCELLOR (Earl *Cairns*):—

My Lords, this is the case of a will fifty years old, the will having been made on the 15th of November, 1826. The question is important, no doubt, to the parties in the present case, but it is not of any very extended importance with reference to other wills.

The will is that of a testator of the name of *Joseph Ely*, who appears to have been resident in the county of *Lincoln*. As the will originally stood it ran thus:—[His Lordship here read the words of the devise].

Subsequently, (as it must now be taken,) to the execution of this will, an obliteration was made in it; and it must also be taken, for the purpose of the present appeal, that that was an obliteration made by the testator himself. The obliterations consisted in this: In the devise of the real estate, after the word "*Elizabeth*" the testator struck out "*Ely*" ("*Ely*" evidently having been struck out by mistake, for he restored it; but that makes no difference); and he also struck out the words "her heirs and assigns for ever." In the bequest of personalty also, after "*Elizabeth Ely*," the words

(1) Vol. i. pp. 126, 132.

"her executors, administrators, and assigns absolutely," are struck out. I refer to that, because I think it not unimportant in reference to the first observation which arises on the matter.

Now, my Lords, I think you cannot for one moment doubt that, putting aside all legislation upon the subject, looking to the character of the obliteration which was here made, and to the fact (which must be taken to be admitted) that it was done by the testator, this was an alteration made deliberately with a set purpose, having reference both to the real and to the personal estate, and operating or being intended to operate in the same way with regard to both. I do not stop to consider whether it had the same operation upon the personalty as it had upon the realty; probably it had not. But it is obvious that the person who made the obliteration desired to remove, in the one case and in the other, the limitation of the words which had been superadded to the name "*Elizabeth Ely*," the words with regard to the real estate being "her heirs and assigns for ever," and with regard to the personalty, "her executors, administrators, and assigns absolutely." That it was done therefore, putting aside the question of statutory enactment, *animo revocandi*, there cannot, I think, be any doubt whatever.

That, my Lords, being the state of the facts of the case, what is the legislation which it is necessary for your Lordships to look at upon the subject? Was this obliteration effectual with regard to the real estate to alter the devise, so that whereas *Elizabeth Ely*, under the will as it originally stood would have an estate in fee simple absolutely, under the will as obliterated she would have only an estate for life? Now, my Lords, the statute which has to be looked to with reference to that question is the *Statute of Frauds*. The 6th section of the *Statute of Frauds* consists of two parts, and I will, in the first instance, read the first part of it:—[His Lordship read it]. That is the first part of the section. The second part is put in apposition to the first, and, as I took the liberty of suggesting during the argument, it seems to me to be inserted for the purpose of constituting an equilibrium between the two portions of the enactment. It runs thus:—[His Lordship read it].

My Lords, I think that, in reality, your Lordships need apply your attention to no more than the first half of the section, because it must be obvious that the object of the Legislature was,

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in the second part, merely to declare affirmatively the consequence which resulted from the first part. The reference to the first part of the section, by the use, in the second part, of the words "in manner aforesaid," shews that it was not intended by the second part to cut down whatever might be the operation of the first. Now the first part is expressed negatively, but involved in it there is really an affirmative enactment. The *Statute of Frauds* had provided that there should be no will, devising lands validly, unless it was executed and attested in a particular way; but, then, a will being valid under the first part of the statute, there is, in this section, a provision as to revocation; and I take the first part of the 6th section to enact, in substance, this: "That a devise in writing of lands, and any clause thereof, shall be revocable by burning, cancelling, tearing, or obliterating the same by the testator himself," that is, by burning, cancelling, tearing, or obliterating the devise, or any clause thereof. And inasmuch as you have the words "burning" and "cancelling," which apply to a material object, you obtain from that the obvious proof that "devise" must mean the will, the written paper executed in the manner provided by the statute.

The enactment therefore is that the will may be revoked, and any clause in the will may be revoked, by burning, cancelling, tearing, or obliterating the same, or by another writing executed in the manner provided by the statute. Those are the two ways in which a revocation may take place. Of course, from the very nature of things, those two ways are not co-extensive. You will of course be able, by means of a fresh writing, to produce results much more extensive than you can produce by cancelling or obliterating; but where you can produce results which are intelligible by cancelling or obliterating, the statute allows you to do it; where you cannot attain the end and object which you have in view by cancelling or obliterating, you must resort to the larger and higher means of making another writing. Of course you may by the other writing produce every result that you can produce by cancelling or obliterating; but it does not follow that by cancelling or obliterating you can produce every result that you can produce by a different writing. The one is a lower form, a lower power of alteration than the other; the other, that is to say the fresh writing, is the higher power.

That, my Lords, being the scheme of the statute, let me apply it to what is done in the present case. You have here a devise "to *Elizabeth Ely*, her heirs and assigns, for ever," and the testator obliterates the words "her heirs and assigns for ever" (I overlook the obliteration of the surname "*Ely*," as it is immaterial), leaving it to stand a devise to *Elizabeth Ely;* so that she takes under a devise which does not go beyond her own life, and does not pass to heirs. Now, I ask in the first place, Why is that not within the statute? The statute speaks of any clause in the devise, (which I take to mean in the will,) being obliterated by the testator. Are the words "her heirs and assigns for ever" not a clause in the will? Why not? It has been suggested that a clause must mean something self-contained, and independent, which when presented on paper would have a meaning by itself, without reference to the context. I do not know any law which says that that is the necessary meaning of the word "clause." When I read an enactment speaking of a devise, that is to say, speaking of a will or any clause in a will, I naturally infer that the word "clause" there means some collocation of words in the will which, when removed out of the will, will leave the rest of the will intelligible. I know no rule which says that the clause itself must be capable of being read as a document by itself if taken alone. The main object is to see if that which you obliterate, which you claim the right to obliterate *de jure* under the statute, is something in the first place which you can obliterate *de facto;* because if the obliteration cannot be made *de facto*, then of course the statute allowing it to be made must be inoperative. Now in this instance, *de facto*, the obliteration can be made. If you strike out the words "her heirs and assigns for ever," the will reads as accurately as the most skilful conveyancer could have worded it. It is complete and perfect in every point.

Then, my Lords, is there any decision which says that the word "clause" must be taken in the limited sense which is assigned to it? I know of none. On the contrary, when I look to the cases which have been referred to, viz., *Larkins* v. *Larkins* (1) and *Short* v. *Smith* (2), it appears to me that in those cases no such meaning

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was supposed to be attached or to be attachable to the word "clause."

But, my Lords, I must go farther. I must say that if we are to resort to first principles, and to a technical examination of the character of the words which are here obliterated, as I understand the rule of law it is, that where you have a devise "to *A. B.* and to his heirs and assigns for ever," in the eye of the law that is a devise to *A. B.*, and a devise to his heirs and assigns for ever. The law says what the words say,—that you have there a devise to all of those persons. No doubt the law goes on to say that where you have a devise made in that way the ancestor shall have the dispositive power over the whole fee simple; but that is for the reason that you have got the devise to the heirs *ad infinitum*, and the devise cannot have effect given to it in any other way except by treating the words as words of limitation.

Therefore, whether I look to the words of the statute, to what must be the popular meaning (having regard to the statute) of the term "clause," or whether I look to the legal signification of the devise to the heirs of *Elizabeth Ely*, in the one case, and in the other, I find that there is something which in my judgment can be removed out of the will by obliteration, something which, when obliterated, is revoked, something which the testator, having written, desires to recall, and which he is allowed to recall, and to treat as *pro non scripto* by the process of obliteration provided for by the statute.

My Lords, I therefore am clearly of opinion that the conclusion arrived at by the Court of Appeal in this case was a correct one; that the striking out of the words was justified by the statute; and that the will for the purposes of the devise is to be read as if those words had never been included in it.

I therefore submit to your Lordships that the appeal should be dismissed with costs.

LORD PENZANCE:—

My Lords, the question in this case turns entirely upon the meaning of the 6th section of the *Statute of Frauds;* and I agree with what has just been said, that although the form of the section

is negative yet it contains within it an affirmative proposition. I read the earlier part of the section as being a power conceded to a testator to revoke by cancelling, burning, obliterating, or by another writing properly executed, some portion, at least, of his testamentary disposition. Now, in considering to what extent that power was intended to be given, of course we must have regard to the precise words of the section. It would run in the affirmative form in this way: "Any devise in writing of lands, tenements, or hereditaments, or any clause thereof, shall, at any time after a certain date, be revocable by any other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or by others in his presence and by his directions and consent." Now, to begin with, what is the meaning of the word "devise?" The previous section says that all devises of lands "shall be in writing and signed by the party so devising the same;" and then the 6th section speaks of a "devise in writing of lands, tenements, or hereditaments." I understand by that language that the meaning of the word "devise" is those words reduced into writing which carry with them a disposition of land. "Devise" does not mean the whole will, because there may be many other things in the will that have nothing to do with the devising of lands; but it means that group or collocation of words reduced into writing which operates as a disposition of the testator's lands. Now this section obviously gives a power to revoke any such devise when it has been made, by burning, cancelling, tearing, or obliterating those words, and if the whole of such words were obliterated it would entirely revoke the devise. It farther gives the testator power to revoke the devise "by some other will or codicil in writing" (that is, a complete will or codicil) "or other writing declaring the same." Declaring what? Why, declaring that he had revoked or intended to revoke the devise. So far no one would dispute the construction of the section.

But, my Lords, in addition to that a power is conferred upon the testator to revoke "any clause" of his devise. Now, what is the meaning of those words? My Lords, I have read with great attention and care the decision of the learned Judges in the Court of Exchequer, and I find that the learned Lord Chief Baron has

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considered that the words, "any clause thereof," that is to say, any clause of the devise, necessarily mean words which contain within themselves a devise; because he says in express terms, "It is the entire devise and bequest, and must remain in force until cancelled in the manner pointed out by the statute." Then he refers to the cases, and then he says, speaking of the case of *Larkins* v. *Larkins* (1), "There, was a complete devise as regarded those two persons, and the alteration operated as to what was struck out; it was a complete revocation as to that particular trustee, and, if so, it comes within the words;" that is to say, he looks upon the case of *Larkins* v. *Larkins* (1) in this light: he says that although it was one sentence, yet it really contained within it two complete devises; and, inasmuch as the one name was struck out, it was within this clause of the *Statute of Frauds*, because the striking out operated as a complete revocation of that entire devise.

Therefore, my Lords, it seems to me that the learned Judge whose judgment I have been reading considered that in order to bring a case within this section of the Act of Parliament it was necessary that the thing which was struck out, and which was to be revoked, should be a set of words containing a complete devise. But it is obvious that it was not necessary for the learned counsel for the Appellant in your Lordships' House to go so far as that, and I do not think he did go so far; he was content to take his stand upon a narrower ground than that; he said that the words "the devise or any clause thereof" must mean some independent sentence, some set of words which have an independent meaning of their own without reference to any context; and he said that if there were such words as those, no doubt a testator might, either by another and properly executed instrument, or by striking his pen through them, get rid of and revoke such words. But, my Lords, I am not aware that there is anything in the statute which justifies that interpretation. When you speak of a devise (meaning thereby what I have already suggested, viz., a set of words carrying with them a disposition of lands) and when you say that it may be revoked in the whole, or that any clause thereof may be revoked, it seems to me to be putting a construction upon the

(1) 3 B. & P. 16–109.

statute for which there is no warranty in the language, to say that that clause must be an independent sentence. One can easily see, by putting an illustration, that no reasonable object of the Legislature would be effected by such a mode of construction, because, as I think was put in the course of the argument, if in this case, instead of the words "her heirs and assigns for ever," the sentence had stopped at the words "*Elizabeth Ely*," and then in a subsequent sentence it had run in this way: "And I farther declare that after the death of my said mother the said property shall go to her heirs and assigns for ever," you would have had an independent sentence, and there, according to the construction contended for, the devise might have been revoked in that respect without touching the rest of the will. My Lords, it is hardly conceivable that the Legislature intended in this section to make a distinction between two things that are identical in effect, the only difference between them being that in the one case the words which carry the devise, or carry the beneficial intention into effect, are to be found as portions of a larger sentence, whereas in the other case they form an independent sentence. One cannot see any reason for such a mode of legislation. If the intention was to allow a part of a devise to be revoked, there seems to me to be no object in confining the power so to revoke to cases in which the part to be revoked found a place in some independent sentence.

But, my Lords, upon this point of the matter, what say the cases that have been referred to? The two cases that have been cited appear to be the only cases that have arisen; which certainly is a very remarkable circumstance. The *Statute of Frauds* was not passed yesterday, and the thousands and thousands of wills which, since the passing of the statute, have had words struck out of them, one would have thought would have given rise to this question, if the matter had been doubted. After all, only two cases have been produced to your Lordships' House in which the matter has in any way been raised. In both those cases, as I understand it, it was not doubted that you could get rid of a devise to *A. B.* by striking out the name *A. B.* But *A. B.* is not an independent sentence; it has no meaning in itself; a man's name standing alone without any context has no meaning whatever; it is no part of a testator's express disposition to use the word *A. B.*

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or the words "*John Brown.*" It seems to me, therefore, that those cases, so far as they go, proceed upon the idea that the words "any clause thereof" are not to be confined to cases in which there is some entire independent sentence, which, standing alone and entirely free of context, has a meaning of its own.

But, my Lords, another matter has been touched upon. It is not necessary for the determination of this case, because here the effect of what has been done has not been in any way to increase but on the contrary, to decrease the interest that *Elizabeth Ely* took. But I confess that I have been wholly unable to appreciate the arguments which have been used elsewhere, and to some extent in this House, upon the question whether, supposing it to be established that this section of the *Statute of Frauds* really did give to the testator the power to revoke a portion of a devise,—that is to say, a portion of the words constituting a devise,—that power would cease to exist in a case where the effect of revoking a portion of the words used would be to increase, and not to diminish, the interest of the taker. If that construction is to be put upon the statute, it ought, I think, to have some words from which that inference could be drawn. The statute says, You may revoke a portion of those words constituting the devise if you like; but it says nothing about the effect. Of course it is easy enough to put hundreds of instances in which, as suggested by the Lord Chancellor, there having originally been the words "without impeachment of waste," a testator strikes his pen through them, and there is then an end of that disposition. Then another case may be put, perhaps rather in the opposite direction; where *A.* and *B.* are joint tenants or tenants in common. Whatever may be the restriction or qualification that is struck out, whether it may have a tendency to increase the benefit of the person in question or not, appears to me to be quite immaterial.

My Lords, the opposite idea, I think, is founded upon a view of the word "devise," which is contrary to what I have suggested to your Lordships as the proper view. As I understand, the idea involved in that argument is this: A devise is a gift; if a testator has made a gift to a man the statute gives him power to revoke the gift or any part of it, and not only to revoke a part of the gift, but to give something more. Looked at in that light one under-

stands the idea; but I venture to think that the word "devise" is not to be read in that way, but that a devise merely means a disposition of lands in words in writing, and that when you say that the testator may revoke "any clause thereof," that is, may revoke any portion of those words, it means any intelligible portion of those words, whether the effect is to increase the beneficial interest of the taker, or the reverse.

My Lords, I do not think that I need farther discuss this matter. I am entirely of opinion that the judgment of the Court of Appeal gave the right construction to this section. The judgment in the Court of Exchequer appears to me to be far too narrow, because the result of it would be this: that if a man had made a devise in any form, and he wished to alter that devise without doing away with it, he could not do it at all except by a fresh will, that fresh will cancelling the first devise; he would have to make a new devise in the amended form that he might desire, and the power of obliterating and cancelling a portion, which was obviously intended by the words of the 6th section of the *Statute of Frauds*, would really come to nothing, because he could do nothing in the way of revocation except by revoking the whole and making a fresh disposition.

I am therefore of opinion that the judgment of the Court of Appeal ought to be affirmed.

LORD O'HAGAN:—

My Lords, I am of the same opinion, and I can add little to what has fallen from my noble and learned friends.

The House is relieved by the candour and discretion of the learned counsel for the Appellant (Mr. *Benjamin*) from any trouble about the facts. The case simply raises a question as to the construction of the 6th section of the *Statute of Frauds*.

Mr. *Benjamin's* argument attempted to establish something of an antagonism between the two clauses of that section; insisting that one of them regards the revocation and the other the alteration of a will. I do not read it so. Although the phraseology is not perhaps the happiest or the clearest, the meaning of it seems to me plain enough. The first clause is negative and the second is affirmative: but the effect of the second is to emphasize and

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make clearer the first. The two clauses have reference to the same subject matter, and regard the same conditions of fact. They are knit together by the words "in manner aforesaid"; and although the one uses the word "revocable" and the other the word "altered," they appear to me to apply to the same things and to accomplish an identical result.

If that be so, then the question arising will be merely what is the true meaning of the word "clause" as applicable to the whole of the section? Mr. *Benjamin* would seek to exclude from the second portion of it "any clause thereof," and confine the operation of that phrase to the first; but, in my view, it applies to the whole: and upon the true interpretation of it our decision must depend.

The judgments of the Court of Exchequer appear to me to have gone upon a too narrow view of the meaning of "clause." I cannot attribute to it that which alone would support the Appellant's contention. The word has various operations, and is used in various ways. There may be a "clause" of a bill in Parliament, or a "clause" of a chapter, or a "clause" of a paragraph, or a "clause" of a sentence. We must consider it, *secundum subjectam materiam*, and find out what is its reasonable construction when taken with the context.

It seems to me plain that the cases to which we have been referred, and on which my noble and learned friends have observed so fully that I shall not farther allude to them,—chiefly the cases of *Larkins* v. *Larkins* (1) and *Short* v. *Smith* (2),—ascribed to the word "clause" in this section, and, in my opinion, rightly ascribed to it, a meaning very different from that which was put upon it by the learned Judges of the Court of Exchequer. The word "clause" must be considered in connection with the antecedent word "devise"; and we must distinguish between the one and the other. The construction of the Court of Exchequer, if maintained, would seem to give to the word "clause" all the meaning that can be attributed to the word "devise." It would point to a sentence, completed and self contained. But is that the necessary effect of the section? The words are, "No devise in writing of lands nor any clause *thereof*," &c. Now, supposing that there is a single devise of a single piece of land, without more, is it to be

(1) 3 B. & P. 16–109. (2) 4 East, 419.

said that because you cannot make out a complete sentence, constituting in itself a separate devise, within that devise, which in itself is integral, the section is not to have any application? I know no rule of law or canon of construction which would compel us to such a conclusion, and all the authorities appear to me to go directly the other way.

Therefore, it seem to me that this narrow interpretation of the word "clause" is not to be maintained, that the view taken by the learned Judges in the Court of Appeal is the right view, and that the word should be interpreted as if it were "part."

I do not so interpret it with reference to later legislation, or because in a subsequent statute there has been a wider and perhaps a better mode of phraseology employed; but looking only to the Act before us, it seems to me not unreasonable to say that a "clause" of a "devise," which must be a smaller thing comprised within a larger, is a "part" of a devise; and, if it be a part, there is an end of the controversy. If the word "part" had been substituted in the statute for the word "clause," I agree with the learned counsel that no such controversy would ever have arisen.

I need scarcely say a word upon the other portion of the argument, which has been ingeniously and earnestly pressed upon your Lordships by the learned counsel for the Appellant. They insisted on the distinction between revocation and alteration, with the apparent result that such an alteration as we are dealing with, could not be accomplished save by the addition of a codicil or the making of a new will. I am inclined to agree with my noble and learned friend who last addressed the House, that such a result comes very nearly to a *reductio ad absurdum*. A revocation surely may be either a revocation of a part or a revocation of the whole; and a partial revocation exists in this particular case. Suppose that, instead of an obliteration, we had a codicil or a new will, reciting that in a former instrument the testator had given to his mother and her heirs some portion of his property, but that he was minded for good reasons to alter his devise, and revoke a part of it, taking away the heritable estate but affirming a gift for life;—the revocation and affirmation would have been complete and effectual. And has not precisely the same thing been done by this obliteration? It has left the life estate to the mother,

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and has taken away from it inheritance by her heirs and assigns. The subject-matter of the devise is perfectly divisible; what has been taken away does not affect the limited interest in that which remains. No new provision is necessary to convey that integral interest: or to extinguish the larger estate which the testator, by his obliteration, has as clearly declared his intention to destroy, as he could have indicated by any form of words.

We are under no necessity of troubling ourselves about the effect of an obliteration involving an increase of the interest devised. There is no such increase here. One thing is taken away. Another thing remains. There is no addition requiring any declaration of will or purpose which the mere obliteration does not necessarily demonstrate: and our decision is not embarrassed by conditions which might be material in another state of facts.

Upon the whole I think this appeal must be dismissed, and the decree affirmed with costs.

THE LORD CHANCELLOR:—My Lords, I wish to say, in order to prevent misunderstanding, that the observations which I made to your Lordships were made only with reference to an obliteration which is a revocation in the proper sense of the term, that is to say, a cutting down or a taking away of something previously given. It is of course possible to conceive the case of an obliteration which might have the effect of enlarging that which before was given. Until a case of that kind arises, if it ever should arise, I wish to keep my judgment upon it altogether suspended.

Decree appealed against affirmed; and appeal dismissed with costs.

Lords' Journals, 28th November, 1878.

Solicitor for the Appellant: *C. M. Elborough.*
Solicitors for the Respondent: *H. B. Clarke & Son.*

[HOUSE OF LORDS.]

THE MAGISTRATES OF EDINBURGH . APPELLANTS;
THE EDINBURGH ROPERIE AND SAIL CLOTH COMPANY AND OTHERS . . . } RESPONDENTS.

H. L. (Sc.)
1878
Nov. 12.

Superior and Vassal—Subdivision of Feu—Redemption of Casualties—Conveyancing (Scotland) Act, 1874, *ss.* 4, 15.

Where part of a feu has been alienated, the casualties of superiority incident to that part may be redeemed separately under the power given by *The Conveyancing (Scotland) Act*, 1874 [37 & 38 Vict. c. 94], s. 15, and the casualties applicable to the *entire* feu need not be redeemed.

The superiors of a feu created before the passing of the Act refused to execute a discharge of the casualties incident to a part alienated after the Act, unless the vassal paid the highest casualty applicable to the *entire* feu:—

Held, affirming the decision of the Court below, that the vassal was entitled to obtain redemption of the casualties, on payment of one year's rent effeiring to his part of the feu, with an addition of 50 per cent.

IN 1851 the *Leith Roperie Company* purchased through their trustees portions of feus which had been created in the last century by the magistrates of *Edinburgh*, under which the composition for entry of singular successors was untaxed. This conveyance was confirmed by writ of confirmation in 1862, which substantially constituted these portions of the old feus into a new and separate feu. In that writ of confirmation it was expressly provided and declared that upon the death of *George Ritchie*, one of the trustees, the superiors should be entitled to a year's rent in lieu of an entry, and in the event of the subjects being sold the purchaser was to be bound to take out an entry on the death of the said *George Ritchie*. Subsequently, in 1867, the *Leith Roperie Company* conveyed to the Police Commissioners of *Leith* a small portion of this feu; but this disposition has not been recorded in the register of sasines, nor is any part of the feu-duty allocated thereon, therefore for this part the *Leith Roperie Company* still remain the entered vassals. In 1876, however, they conveyed the whole remainder to the Respondents, the *Edinburgh Roperie and Sail Cloth Company*, and this disposition was recorded in the

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register of sasines; and the Respondents thus became by virtue of the 2nd sub-section of the 4th section of the statute 37 & 38 Vict. c. 94, entered as vassals to the Appellants without any more formal procedure. The Respondents were taken bound to pay the whole of the feu-duty of the subjects included in the writ of confirmation of 1862. It was under these circumstances, Mr. *Ritchie* being still alive at the date of summons, that the Respondents intimated to the magistrates of *Edinburgh* their desire to redeem prospectively the proportionate share of casualties applicable to their part of the feu, under the authority of the 15th section of the *Conveyancing (Scotland) Act*, 1874 (1). They tendered payment of £214 13*s.* 3*d.*, being one year's rent applicable to their part with 50 per cent. added. The Appellants refused this sum contending that the Respondents were not entitled to redeem, except on payment of an amount equal to the highest casualty of, at least, the entire subjects contained in the writ of confirmation of 1862. As that part of the feu rented by the Police Commissioners was valued at a yearly rental of £60, this claim by the Appellants made a great difference in the amount payable. The Respondents ultimately found it necessary to raise this action in order to enforce the right to redeem; and they joined with them as Pursuers the trustees of the *Leith Roperie Company.*

There was another small portion of land the casualties of which the Respondents wished to redeem (and the composition sum payable is included in the above sum of £214 13*s.* 3*d.*), but as to it there was no question raised, the composition for entry of singular successors being of fixed amount.

The following interlocutor was pronounced by the Lord Ordinary (2):

Finds and declares that in terms of, and in accordance with, the provision contained in the 15th section of the *Conveyancing (Scotland) Act*, 1874, the Pursuers, the *Edinburgh Roperie and Sail Cloth Company*, and *James Hay*, as manager and for behoof of the said company, as proprietors of the subjects described in the summons, are entitled, upon payment to the Defenders, as superiors of the said subjects, of the amount of the highest casualty, estimated as at the date of redemption, with an addition thereto of 50 per cent., to redeem the whole casualties of superiority incident to the said whole lands, subjects, and others described in the summons, and payable to the Defenders as superiors of the same; and that the Pursuers are entitled, as at the date of signeting the said

(1) See *post*, at p. 91. (2) Lord *Young*.

summons, being the 21st of November, 1876, to insist upon the Defenders granting and delivering to them, and are entitled to receive from the Defenders, but always at the Pursuers' expense, a discharge in terms of the said statute of all such casualties incident to the whole of the said lands, subjects, and others, and payable to the Defenders from the same, subsequently to the date of signeting the said summons, and that upon making payment to the Defenders of the sum of £214 13*s.* 3*d.*, being the amount of the highest casualty owing and exigible therefrom, as fixed by the Defenders, including the said addition of 50 per cent., with interest thereof at the rate of 4 per cent. per annum from the said 21st of November, till payment or consignation in bank of said sum of £214 13*s.* 3*d.*, and decerns and ordains the Defenders to execute and deliver to the Pursuers, at the Pursuers' expense, such a discharge, upon the Pursuers making payment to the Defenders of the said sum of £214 13*s.* 3*d.*, with interest as above set forth; but reserving always to the Defenders, notwithstanding such redemption of the casualties and superiority, full right and title to levy the future feu-duties payable from the said subjects in the same manner and to the same effect as they have heretofore been, and are at present entitled to do; and also reserving to them the right and option to insist, if so advised, that the said redemption money or price so to be paid by the Pursuers shall be converted into an annual sum or feu-duty equal to 4 per cent. upon the capital.

The First Division, on the 13th of July, 1877, adhered to this interlocutor, and refused the reclaiming note presented by the Appellants (1).

On appeal,

Mr. *E. E. Kay*, Q.C., and Mr. *M'Laren* (of the Scotch Bar), maintained that the Respondents' feu was not a feu created prior to the *Conveyancing (Scotland) Act*, 1874. The only feu in existence at the passing of that statute was the one granted by writ of confirmation to the *Leith Roperie Company*. Therefore as no power was given by the statute to redeem a part of the feu the vassal if he redeem any part must redeem all the casualties in the last charter. Even where there are several vassals and one is insolvent the superior is entitled to come down on the co-vassals for all the casualties. So under the Act of 1874 a superior might say to a vassal, "I recognise the division of the feu, but you are bound for the whole redemption;" but that vassal can enforce repetition from his fellow vassals.

[LORD SELBORNE:—Suppose one vassal wanted to redeem his part, is the owner of the other part of the feu under any obligation to redeem also?]

(1) Scotch Cases, 4th Series, vol. iv. p. 1035.

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Perhaps not, but the owner of only a part had no right under this statute to redeem at all, unless he redeemed all. The statute only dealt with the general case of an undivided feu created before 1874, and abolished casualties of superiority in feus created after that date. If the Respondents' claim was not warranted by the provisions of that statute it was ill founded, for no such right of commutation existed prior to 1874. [They relied on *Wemyss* v. *Thomson* (1). See also *Stair*, 2, 3, 5; *Erskine*, 2, 7, 8; *University of Glasgow* v. *Hamilton* (2); and in commenting on the progress of the law before 1874, they cited the statutes of 1469, c. 37 (referred to in *Hill* v. *Merchant Company of Edinburgh* (3)); 1669, c. 18; 20 Geo. 2, c. 50; 10 & 11 Vict. c. 48; 31 & 32 Vict. c. 101, and *Harp* v. *Webster* (4)].

Mr. *Southgate*, Q.C., and Mr. *Thorburn* (of the Scotch Bar) appeared for the Respondents, but were not called upon.

The following opinions were delivered by the Law Peers:—

EARL CAIRNS, L.C.:—

My Lords, in this case your Lordships are asked to adopt a construction of the Scotch *Conveyancing Act* of 1874 different from that placed upon it by the unanimous judgment of the Court of Session, pronounced in the first instance by the Lord Ordinary (5), and afterwards by the First Division. And it appears to me to be perfectly clear that the conclusion arrived at by the Court of Session was a correct conclusion. The effect of the Scotch *Conveyancing Act* was this: by the 4th section it provided that

"It shall not, notwithstanding any provision, declaration, or condition to the contrary in any statute in force at the passing of this Act, or in any deed, instrument, or writing, whether dated before or after the passing of this Act, be necessary, in order to the completion of the title of any person having a right to the lands in whole or in part, whether such right shall have been acquired by succession, bequest, gift, or conveyance, that he shall obtain from the superior any charter, precept, or other writ by

(1) Jan. 19, 1836; 14 S. 233.
(2) Robertson, App. 172.
(3) Jan. 17, 1815; F. C. vol. xviii. p. 132.
(4) 15 Scottish Law Rep. 569.
(5) Lord *Young*.

progress; and it shall not be competent for the superior, in any case to grant any such charter, precept, or other writ by progress: Provided always, that nothing in this Act contained shall prevent the granting of charters of novodamus," and so forth.

Now, your Lordships are well aware that by the course of conveyancing in *Scotland* before this Act, where there was an alienation of a feu or of a part of a feu, it was necessary for the disponee to go through a somewhat complicated course of conveyancing; to have those deeds which are called charters in progress, and then to be formally entered by his superior; and by a custom which had its origin at the time that feus were inalienable in *Scotland*, and which relaxed that inalienability upon certain terms—the principal term being the right to exact a recompense for permitting alienation—this course of conveyancing was accompanied by that which was a very material consideration to the superior, namely, a right to exact from the disponee a payment in the nature of a remuneration for permitting the alienation. The statute of 1874 has stepped in and has swept away that course of conveyancing, and upon an alienation has allowed the disponee, on the conclusion of his purchase, to be in the same position as if he had under the former course of conveyancing been formally entered by his superior as the owner of the feu.

The trustees of the *Edinburgh Roperie Company*, the Respondents, having made a purchase of a portion of a feu which was in existence when the Act of 1874 was passed, and being thus the entered proprietors of that feu by virtue of the statute, claim the benefit of the 15th section of the statute. That section provides that

"The casualties incident to any feu created prior to the commencement of this Act" (I have no doubt that the feu in this case, as regards a portion of the land in which the Respondents are entitled, was a feu created before the commencement of this Act) "shall be redeemable on such terms as may be agreed on between the superior and the proprietor of the feu in respect of which they are payable: and failing agreement, all such casualties, except those which consist of a fixed amount stipulated and agreed to be paid in money or in fungibles at fixed periods or intervals, may be redeemed by the proprietor of the feu in respect of which the same are payable

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on the following terms, viz.: In cases where casualties are exigible only on the death of the vassal, such casualties may be redeemed on payment to the superior of the amount of the highest casualty estimated as at the date of redemption, with an addition of 50 per cent." That is the case which has occurred here, the highest casualty as applicable to the present case being the year's rental mentioned in the old Scotch statute (1). Upon that state of things the Lord President observes:—

> The 4th section of the statute, in the 2nd sub-section, provides that infeftment shall imply entry with the superior, and therefore when Mr. *Hay*, on behalf of the *Edinburgh Roperie Company*, took infeftment in that part of the subject which he had bought from the *Leith Roperie Company's* trustees, he became thereby the entered vassal of the Defenders (Appellants). No doubt the effect of that entry was somewhat different from what would have been the effect of his taking an entry before the statute. He did not require to take an entry according to the old law when he bought this subject from the trustees of the *Leith Roperie Company*, because there was an entered vassal, viz., Mr. *Ritchie*. But the statute implies the entry at once, and it provides also for what is to be the effect of that implied entry as regards the rights and obligations of superior and vassal. The 3rd sub-section of the same section (4th) provides that it is not to affect the rights of the superior as regards duties or casualties. In short it provides that, as regards the casualties of superiority, they shall not be payable at any other time, or on any other conditions, than they would have been if this Act had not been passed. So that the effect is, that while Mr. *Hay* was made the entered vassal as soon as he took infeftment by force of the statute, he did not require to pay a composition on that entry, his liability to pay the composition being postponed until the death of the last entered vassal, and the right of the superior to demand a casualty being in like manner postponed. The Pursuers being the entered vassals of the Defenders, and seeking to have the casualty redeemed under the terms of the 15th section of the statute, it appears to me quite unreasonable and beyond all intelligible construction of this statute to say that this party, who is entered with the superior and is now the superior's vassal in this particular part of the original feu as distinguished from the other, is to pay anything more by way of composition than one year's rent of that subject in which he is the vassal of the superior (2).

I entirely agree with that view of the statute; that it would be unreasonable in the greatest degree, and that nothing but the clearest words could lead any Court to put such a construction upon the statute as would make the disponee of a portion of a feu, who by virtue of the statute is to be taken as entered as vassal of that portion of the feu, lie under an obligation of redeeming the casualties by a payment made with reference to the value of

(1) Statute of 1669, see *post*, at p. 95.
(2) Scotch Cases, 4th Series, vol. iv. p. 1037.

the whole feu, in a part of which only he is the vassal. I think that that is not the true construction of the statute, and that the construction adopted by the Court below is perfectly right.

I therefore propose to your Lordships that the appeal be dismissed with costs.

LORD PENZANCE:—

My Lords, I entirely agree with what has fallen from my noble and learned friend, and I have but a very few sentences to add to what he has expressed.

It is stated by Lord *Young*, and it has not been denied in the argument, that that statement is a correct statement of the Scotch law,—that "any singular successor by the law of *Scotland* is entitled to any entry with the superior on paying a year's rent of that part of the feu to which he singularly succeeds and to which he has a disposition." I assume, therefore, that that is a correct representation of the law of *Scotland*, and that any singular successor taking possession, and having an entry with the superior to a portion of the feu, is liable only to pay a year's rent, that is to say, a year's value of the land of which he so takes possession.

Now, bearing that in mind, what is the proper construction of this 15th section? The section begins with these words:—"The casualties incident to any feu created prior to the commencement of this Act." No doubt the feu of 1862 was created prior to the commencement of the Act—what, then, are the casualties incident to that feu? According to the statement which I have just read from Lord *Young's* opinion, the casualties incident to that feu are casualties amounting to a payment of the yearly value of any portion of that feu which is alienated. It seems to me, therefore, that the words "casualties incident to any feu" must be read and understood to mean such casualties as, according to the law of *Scotland*, would be payable in respect of that feu; and where a portion of the feu has been alienated, the law of *Scotland* tells us that the casualty payable is the yearly value of the part that is so alienated. I think, therefore, that the 15th section clearly includes the case of the alienation of the land, and therefore that the casualty which applies to that part is redeemable.

Then, if it is redeemable, there can be no question that it is

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redeemable upon a calculation framed upon the basis of what the vassal would have had to pay if he had not redeemed the feu, but had followed the ordinary course in paying a casualty proportionate to the part of which he had become the disponee.

Under those circumstances, I confess that I can find no fault with the decision at which the Court of Session has arrived.

LORD O'HAGAN:—

My Lords, I am quite of the same opinion. The judgments with which we have to deal are the judgments of the Scotch Judges upon a matter which involves a good deal of consideration of the practice in *Scotland* as well as the construction of Acts of Parliament; and I think we ought to be very slow indeed to differ from those unanimous judgments upon such a matter.

But, quite independently of that, it seems to me that the policy of the statute is clear, and that the words are large enough to carry out the policy. This is a case of an entered vassal, a man who has a separate part of a feu which belongs to him absolutely as his own property; and it would seem to me, as my noble and learned friend on the woolsack has said, in the highest degree unreasonable, to hold that a man so recognised by his superior and possessing in severalty his own property, should be obliged for the purpose of getting rid of casualties to pay the debts of other people in addition to his own.

That being the reasonable policy in the matter, the words of the statute, I think, without any particular wrenching or straining of them, sufficiently carry it out. In the first place, the 4th section, which is the leading section after the interpretation clause, points distinctly to the case of a person who has a right to the lands in whole or in part, and it deals with an interest in precisely the same condition as those of the Pursuers. When we come to the 15th section and consider the construction to be fairly given to it with a view to the actual circumstances of the case and the rights of the parties, it appears to me that if the interpretation contended for at the Bar of your Lordships' House were adopted, this section would become for all practical purposes perfectly useless. It is, as was shewn in the course of the argument, the commonest thing in *Scotland* to have subinfeudation,

various proprietors existing where there was formerly one; and if the section were to be read as making the owner who is to deal about the casualties the proprietor of the whole feu, and under no circumstances the proprietor of a part, the beneficial effect of its provisions would be nullified. I do not think it is so. There is here a particular person possessing a portion of the feu in severalty; there is a payment to be raised from that particular portion; and that being so, it does not seem to me to be a straining of the words to say that the proprietor is the proprietor of the portion which has been allocated to himself and which he holds as a recognised vassal under the superior.

Under these circumstances, I sustain the proposition of my noble and learned friend.

LORD SELBORNE:—

My Lords, I am of the same opinion, and I will only add a few words. In *Wemyss* v. *Thomson* (1), the case relied upon by the Appellants, the superior was held to be entitled to retain, as against the purchaser of part of the feu, his remedy for the entirety of the feu-duty, and of the duplicand of the feu-duty which was the casualty on the entry of an heir: both these being conventional liabilities of the feuer, and having in themselves no distributable quality, according to which they could be apportioned over different parts of the land. But, in the same case, no similar claim was either made by the superior, or recognised by the Court, as to the casualty for the entry of singular successors, which was not taxed, and which (in the language of the statute of 1669) was due "by statute and the constant practice of the kingdom," according to the measure of one year's rent (that is, one year's annual value to be let), of the lands of which the superior was bound to grant entry. It is impossible, in my opinion, to extend this obligation, in any case, to one year's value of any other lands than those to which entry might be claimed; and, therefore, when entry could be claimed to part only of the lands included in the original feu, this casualty would only be one year's value to let of that part of the lands.

In the present case, the statute of 1874 has given the same

(1) Jan. 19, 1836; 14 S. 233; 8 Scotch Jur. 181.

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rights, with the same liabilities, to the Respondents, as if, before that enactment, they had been actually entered and confirmed as vassals by the superior, as to the particular lands purchased by them, and not as to any other lands. This being so, the 15th section of the same Act entitled them to redeem this casualty upon the terms which the Court of Session has allowed; and the 16th section, and the form of discharge there referred to, make that right additionally clear.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 12th Nov. 1878.

Agents for Appellants: *J. & J. Graham.*
Agents for Respondents: *Holmes, Anton, & Greig.*

[HOUSE OF LORDS.]

FIRST APPEAL.

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SIR THOMAS KIRKPATRICK, BART. . . APPELLANT;
THE REV. RILAND BEDFORD . . . . RESPONDENT.

SECOND APPEAL.

CHARLES J. BEDFORD, AND ANOTHER . . APPELLANTS;
SIR THOMAS KIRKPATRICK, AND ANOTHER RESPONDENTS.

Trust—Settlement—Legacy to Residuary Legatee held good—Intention of Testator.

A testator gave to *R. K.* £2000 and to "each of his brothers £1000," and bequeathed the residue of his estate between Sir *T. K.* and *R. B.* Sir *T. K.* was the eldest brother of *R. K.*, who was the third among eight:—

Held, reversing the decision of the Court below, that Sir *T. K.* was entitled to the legacy of £1000 as one of the brothers of *R. K.* in addition to half the residue.

Interest on Legacies payable out of Price of Heritable Estate.

Trustees were directed to sell heritable estates as soon after the testator's decease as practicable, and pay certain legacies. After a necessary litigation running over two years, the property was realised. On a question whether interest was payable from the testator's death, in accordance with the general rule in *Scotland*, or from the date of the sale:—

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Held, reversing the decision of the Court below, that interest was due on the legacies from the testator's death.

Legacy Duty—Effect of Marginal Note, "All free of Legacy Duty."

In his holograph will, a testator wrote along the margin opposite to legacies to servants these words, "All free of legacy duty." There was no circumflex or mark to shew where they were intended to be read:—

Held, reversing the decision of the Court below, that all the legacies given in the will, both those to relatives and those to servants, were free of legacy duty.

APPEALS against an interlocutor pronounced by the Court of Session, the 20th of December, 1877, on a special case.

William Sharpe, of *Hoddom*, died the 18th of December, 1875, possessed of the heritable estates of *Hoddom* and *Knockhill*, and others, and personal property of about £10,000. By a trust disposition and settlement, dated the 19th of May, 1870, by which he dealt with the estates as belonging to him in fee, he conveyed them to trustees, to sell and realise as soon after his death as it could conveniently be done, and to apply the residue in the manner to be specified in any writing under his hand.

Subsequently, on the 13th of June, 1870, he executed a separate holograph deed, in which he referred to his trust-disposition and settlement; and then on the narrative that he has been advised by counsel of his right to do so, orders and instructs his trustees, as soon after his decease as they possibly can find to be practicable, to sell and dispose of his whole heritable property. The deed then continued:

That being, I deem, a sufficient instruction to sell, I now proceed to instruct my trustees as to the distribution of the price, viz., the price of the heritage. . . . I hereby order and instruct my said trustees to make payment of all my just debts which may stand against me at the time of my death, also the following legacies:—To my nephew, *Charles Bedford*, the sum of £5000, and the like sum of £5000 to his brother, *Campbell Bedford:* To *Roger Kirkpatrick*, son of my nephew, Sir *Charles Kirkpatrick*, deceased, the sum of £2000, and to each of his brothers the sum of £1000, the share of any brother predeceasing to go in equal division among the others: Further, to pay to the family, equally among them, share and share alike, of the late *George Inglis*, the sum of £2000: To *Robert Menzies*, my servant, if in my service at the time of my death, £1000: Also to pay to *John Dalzell*, if in my service at the time of my death, as a faithful servant, the sum of £300; and to *William Jackson*, if in my service, the sum of £200 at the time of my death; also to pay to *David Gillum*, once my servant, and dismissed from my service, as I thought, harshly, while a deserving lad, the sum of £50 sterling; all which legacies I desire my said trustees to pay over from

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the first and readiest of my saleable estate: And finally, so far as I see at the present moment, I desire and require my said trustees to pay over the residue of my whole estate, excepting as before excepted and bequeathed, to Sir *Thomas Kirkpatrick*, Baronet, presently abroad, and the Reverend *Riland Bedford*, my nephews, equally *among* them, or rather *between* them, share and share alike.

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By a codicil dated the 27th of December, 1873, Mr. *Sharpe* desired his trustees to pay £200 to *John Jackson*, his house servant, "and that free of legacy duty." And by a codicil dated two days later he directed his trustees to purchase an annuity of £300 per annum for the wife of *Charles Bedford.*

On the death of *William Sharpe* the trustees were confirmed his executors on the 10th of March, 1876. But the remaining trustee of General *Sharpe*, brother to the testator, and in whom the estate of *Hoddom* was feudally vested, refused without judicial authority to hand over the estates. *William Sharpe's* trustees therefore found it necessary on the 31st of March, 1876, to raise an action in the Court of Session, concluding for declarator that they had a preferable right to the estates *Hoddom* and *Knockhill.* This litigation continued until the 10th of March, 1877, when the trustee of General *Sharpe* was ordered to convey them to *William Sharpe's* trustees (1). This was done in August, and the estates were then sold for £240,895, with entry at Martinmas, 1877. Besides the personal estate of £10,701. 13*s.* 4*d.* the trustees received to the date of the sale about £10,000 as rent.

Sir *Charles Kirkpatrick*, mentioned in the deed of instructions, left eight sons, who still survive, of whom Sir *Thomas* is the eldest and *Roger Kirkpatrick* (also mentioned) is the *third.*

In these circumstances Sir *Thomas Kirkpatrick*, the Appellant in the first appeal, maintained that he was entitled under the provisions of the holograph deed to a legacy of £1000 (as being one of *Roger Kirkpatrick's* brothers) over and above his half of the residue. The trustees and the Respondent, the Rev. *Riland Bedford*, to whom the other half of the residue is given, contended that Sir *Thomas* was not entitled to the legacy of £1000, his right upon a sound construction of the said deed being limited to one-half of the residue.

It was further maintained by the legatees (the Appellants in

(1) Scotch Cases, 4th Series, vol. iv. p. 641.

the second appeal) that interest was payable on the legacies from the date of *William Sharpe's* death; and also that the legacies should be paid free of legacy duty, in terms of the marginal note, "All free of legacy duty." In reference to these clauses the two residuary legatees (the Respondents in the second appeal) contended that no interest was due upon the legacies, except from Martinmas, 1877, the date of the sale, there having been no undue delay in the realisation of the trust estate, and payment being impossible until the estate was realised; and that the legacies were not payable free of legacy duty, the marginal addition having reference only to the legacies opposite which it was written, namely, those to the servants.

In the special case presented to the Court of Session the trustees were first parties, Sir *Thomas Kirkpatrick* second party, the Rev. *Riland Kirkpatrick* third party, and the other legatees under the deed of instructions fourth parties.

On the 20th of December, 1877, the Second Division found (Lord *Gifford* dissenting from the conclusion arrived at on the first question) that:

(1.) Sir *Thomas Kirkpatrick* is not entitled, as one of *Roger Kirkpatrick's* brothers, to receive payment of a legacy of £1000 under the provisions of *William Sharpe's* instructions to his testamentary trustees, in addition to the share of residue bequeathed to him. (2.) That the first parties are bound to pay to all the legatees interest upon their respective legacies from the term of Martinmas last, at the rate of 5 per cent. per annum. (3.) That the marginal note or addition by the said *William Sharpe* on the third page of his instructions to his trustees, dated 13th June, 1870, relative to his trust-disposition and settlement, as to payment of legacy duty on the legacies bequeathed by him, applies only to the legacies to his servants and others on the said third page, beginning with the legacy to the family of the late *George Inglis*. Allow the expenses incurred by all the parties out of the trust estate (1).

Against part *first* of this decision Sir *Thomas Kirkpatrick* (second party) appealed; and against parts *two* and *three* the legatees (fourth parties) appealed to the House; and the two appeals were directed to be heard together.

Mr. *Graham Hastings*, Q.C., Mr. *Dauney*, and Mr. *A. Low* (of the Scotch Bar), appeared for Sir *Thomas Kirkpatrick*, but, having merely stated the facts, were stopped.

(1) Scotch Cases, 4th Series, vol. v. p. 380.

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Mr. *E. E. Kay*, Q.C., and Mr. *Gillespie* (of the Scotch Bar), maintained, for the Rev. *Riland Bedford*, that it was not the intention of the testator that Sir *Thomas Kirkpatrick* should receive any legacy as one of *Roger's* brothers in addition to his share of the residue. The residuary legatees had already received £103,000 each, it could not be assumed to have been the intention of Mr. *Sharpe* to increase the Appellant's share by so small a bequest as £500. This also met the argument of the Appellants that the testator intended to give him a legacy of £1000.

[They cited *Russell* v. *Dickson* (1) and *Horsburgh* v. *Horsburgh* (2).]

Mr. *Southgate*, Q.C., and Mr. *Readman* (of the Scotch Bar), maintained, for the Appellants in the second appeal, that interest was due from the death of the testator, that being the general rule in *Scotland*. If the decision of the Court below was right the pecuniary legatees would get no part, as interest, of the £10,000 paid as rent during the two years that the property was unsold. In *England* general legacies bear interest, although payment be impracticable: *Wood* v. *Penoyre* (3). And if the legacy is specific its proceeds belong to the legatee from the testator's death. *Lord* v. *Lord* (4) was a case in which the testatrix gave the property when the litigation which was then proceeding should be ended. The payment of the legacies given here was not postponed. A direction to sell operated as a conversion of the beneficial estate from heritable to movable; and the conversion takes effect from the time the direction was binding on the trustees, without regard to its actual execution: see *Angus* v. *Angus* (5); *Erskine* (6); *Advocate-General* v. *Blackburn's Trustees* (7); and *Somerville's Trustees* (8). If the property was considered as money at the testator's death, then the legacies vested *a morte testatoris*, and interest was due on them from that date: *Elliott* v. *Bowhill* (9). In *Smith's Trustees* (10), although vesting was postponed,

(1) 4 H. L. C. at p. 304. 17 June 307
(2) Jan. 12, 1847; 9 D. 3[illegible]; 19 Scot. Jur. 118.
(3) 13 Ves. 333–4–5.
(4) Law Rep. 2 Ch. App. 782.
(5) 1825; 4 S. 279; N. E. 283–6.
(6) Nicolson's Ed. vol. i. p. 293 (Ed. note).
(7) 1847; 10 D. 166.
(8) 1859; 21 D. 1148.
(9) 1873; 11 Macph. 735.
(10) 1867; 6 Macph. 83.

each legatee was held entitled to his share at the date of testator's death, with interest and fruits which had subsequently accrued thereon: see also *Dunbar* v. *Societies of Scripture Readers* (*Duff's Trustees*) (1); *Campbell* v. *Reid* (2); *Ogilvie* v. *Boswell* (3).

[They also cited in their printed case *Fletcher* v. *Ashburner* (4); *Dickson's Tutors* v. *Scott* (5); *Macpherson* v. *Tytler* (6); *Arbuthnot* v. *Arbuthnot* (7); *Sime* v. *Balfour* (8); *Glasgow's Trustees* (9); *Macalister Trustees* (10); *Bristow* v. *Bristow* (11); *Smith* v. *Barlas* (12).]

On the Marginal Note:—The words "All free of legacy duty" referred to all the legacies in the will. There was no circumflex or other mark to attach it to the servants only. It seemed to begin where the legacies ended, as if the idea of giving his legacies exempt from duty occurred to the testator just after he had named all the legatees, and he adopted the marginal note as the best means of giving expression to that idea.

Mr. *Hastings Graham*, Q.C., and Mr. *Low* (of the Scotch Bar), contended, for the Respondents, the residuary legatees, that interest on the legacies was not payable until the estates were sold. This was a case of postponed distribution. The words "so soon after my decease as practicable" shewed the testator anticipated some delay. The observations in *Lord* v. *Lord* (13) seemed to apply here. No trust arose in this case until the litigation with General *Sharpe's* trustee was ended, and the legacies could only bear interest from that date. In *Turner* v. *Buck* (14) the Master of the Rolls said that the legatees could only claim interest from the period at which the sale of the real estate might reasonably have been effected; and that a year from the testator's death was a reasonable period; here two years might not be an unreasonable period where the testator in his will seemed to anticipate litigation before his right to sell the estates could be con-

(1) 1862; 24 D. 552.
(2) 1840; 2 D. 1084.
(3) 1852; 14 D. 363.
(4) 1 Bro. C. C. 495–9.
(5) 1853; 16 D. 1.
(6) 1852; 12 D. 486; rev. H. of L. 1 Macq. 243, and 15 D. 17.
(7) Mor. 539.
(8) 13 F. C. 339; Mor. Ap. 1; 5 Pat. Ap. 525.
(9) 1830; 9 S. 87.
(10) 1836; 15 S. 170.
(11) 5 Beav. 289.
(12) 1857; 19 D. 267.
(13) Law Rep. 2 Ch. Ap. 782.
(14) Law Rep. 18 Eq. 301.

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firmed. *Duff's Trustees* (1) was in their favour. Martinmas, 1877, was the earliest period at which payment of the legacies could be demanded, and the Appellant were only entitled to interest from that date.

On the Marginal Note:—The word "all" means all the legacies against which the words were written. It did not apply to all the legacies in the will. It began with the first servant, and ended with the last gift to servants. The codicil giving a legacy to another servant expressly stated that it was free of legacy duty, whereas the codicil made two days later giving a legacy to Mrs. *Charles Bedford* contained no such benefit; this shewed the intention of the testator, and was in itself a circumflex to attach the words to the legacies to servants only. It was more reasonable to suppose that the testator meant to release from legacy duty his servants than his relatives.

The following opinions were delivered by the Law Peers:—

EARL CAIRNS, L.C.:—

My Lords, these two appeals raise three separate questions.

In the first appeal one of those questions alone arises. In that appeal Sir *Thomas Kirkpatrick* complains of the decision of the Court of Session (2), on the ground that it has deprived him of a legacy of £1000, to which he alleges that he is entitled under the testamentary disposition of *William Sharpe*. Now, my Lords, the words upon which he relies are these: *William Sharpe*, in his testamentary disposition of the 13th of June, 1870, and certain days in December, 1871 and 1873, made this gift, "I hereby order and instruct my said trustees to make payment of all my just debts which may stand against me at the time of my death, also the following legacies:—To my nephew, *Charles Bedford*, the sum of £5000, and the like sum of £5000 to his brother, *Campbell Bedford:* to *Roger Kirkpatrick*, son of my nephew Sir *Charles Kirkpatrick*, deceased, the sum of £2000, and to each of his brothers the sum of £1000, the share of any brother predeceasing to go in equal division among the others." Now Sir *Charles Kirkpatrick*, deceased, left several sons; the eldest was the baronet, Sir *Thomas*,

(1) 1862; 24 D. 552. (2) Scotch Cases, 4th Series, vol. v. p. 380.

the Appellant. The second son was not the son mentioned by name here as *Roger Kirkpatrick*; he was the third; and there were, besides the baronet, altogether seven. Undoubtedly Sir *Thomas Kirkpatrick* is a brother of *Roger*, and the gift is "to *Roger Kirkpatrick*, son of my nephew, Sir *Charles*," "the sum of £2000, and to each of his brothers the sum of £1000." Now, if the matter stood there the case is not one which admits of argument. The question to be asked is, is Sir *Thomas* a brother of *Roger?* The answer is that he is; and thereupon the conclusion follows that the gift is to him as one of the brothers of *Roger*. The words are not ambiguous or equivocal (1). Unless, therefore, there is something in some other part of the will countervailing and taking away that which is here given, the gift is clear and undoubted, and must prevail.

Now, what is said to qualify the effect of these words is this: after giving a number of other legacies the testator continues:—"And, finally, so far as I see at the present moment, I desire and require my said trustees to pay over the residue of my whole estate, excepting as before excepted and bequeathed, to Sir *Thomas Kirkpatrick*, Baronet, presently abroad, and the Reverend *Riland Bedford*, my nephews, equally *among* them, or rather *between* them, share and share alike."

My Lords, I have been in some doubt as to the manner in which the words which I have read have been looked upon in the Court below, and treated by the Respondents in the first appeal, as doing away with the effect of the words which I previously read. Part of the argument appears to have turned upon a consideration of the cases of double gifts, gifts in the same instrument of two sums to the same person. Those cases have no application whatever to the case of a residue given to a person to whom previously a specific or pecuniary gift has been made. No case could be cited, no case has ever occurred, where any one ever thought of arguing that the cases about double gifts had any application to a case which, *ex specie*, is entirely distinguishable and different from them, the case of a gift of residue following a specific gift.

Then part of the argument was, not that this was a case of

(1) See remarks, *post*, at p. 104.

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double gift, but that you are to infer from the fact of the residue being given to one of the brothers of *Roger*, and from the fact of the residue being very large, that therefore when the expression in the earlier part of the will "the brothers of *Roger*" was used, that really meant the "brothers of *Roger* other than that brother to whom I afterwards give the residue." Now, my Lords, that is not construing the will of the testator; it is making for the testator a will entirely different from that which he has made. It is introducing and interpolating words which he has not used, and for the interpolation of which there is no authority whatever. It appears to me that the conclusion at which the Court below arrived cannot be sustained without doing a degree of violence to plain and unambiguous words for the doing of which I am aware of no authority whatever.

My Lords, I have pointed out that the words of the will as to the legacy to Sir *Thomas Kirkpatrick* were plain and unambiguous, and that where you have clear and unambiguous words in a will it is not for the Court to speculate what were the reasons which led the testator to make a provision as to the meaning of which there is no doubt. But I may make one observation which it is as well to refer to. If we were to speculate in this case for a reason, there seems to me to have been a perfectly good reason why the testator should give a definite pecuniary legacy to one of the persons to whom he afterwards gave a share of the residue, because if it had turned out that the two estates of *Hoddom* and *Knockhill* were not disponable by the testator, and that he had nothing but his own personal estate to satisfy the legacies, the personal estate at the time of his death being stated as amounting to something over £10,000, the result would have been that all the brothers of *Roger Kirkpatrick*, including Sir *Thomas*, might have benefited and would have benefited by the disposition in their favour of pecuniary legacies, and that whereas, for want of residue, Sir *Thomas* would otherwise have taken nothing by virtue of the gift of the pecuniary legacies, he would in that state of things have taken the same sum of money as his brothers would have taken.

Now, my Lords, in the second appeal two other questions arise. The first is as to interest upon the legacies which are given by will, and there the Court below has held that interest is not to be

given from any period anterior to the time when the heritable property, which was the largest property possessed by the testator, viz., *Hoddom* and *Knockhill*, was sold, namely, Martinmas, in the year 1877. I must say that it has not been in controversy at your Lordships' Bar that the general rule in *Scotland* (differing somewhat from the English rule) is, that if there is a legacy, pure and simple, given in the ordinary way, it carries interest from the death of the testator, and carries interest at the rate of 5 per cent. But the argument here has been, and it appears to have been adopted by the learned Judges of the Court of Session, that there was here, not an independent gift, if I may use the expression, of legacies, but that these sums which are called "legacies" in the will were really portions of the purchase-money of the particular estates specified, namely, *Hoddom* and *Knockhill*, and given as such that there was no particular gift of legacies but merely a direction to sell those particular estates; and then, when they were sold, a direction to pay certain specified sums out of the proceeds. I cannot view the will of the testator as admitting of that construction. I will observe, in the first place, that the instructions, as they are called, the "holograph instructions," of the testator of 1870, 1871, and 1873, are to be taken in connection with a trust disposition and settlement of May, 1870, and in fact refer to it and speak as if they were continuations of that trust settlement. Now, by that trust disposition and settlement the testator had conveyed to the trustees all the property of every kind that he possessed, real and personal, including *Hoddom* and *Knockhill*, and he had directed them to convert the property into money, and in the first place to pay and discharge his just debts and funeral expenses; and then, secondly, to "apply the residue of the proceeds of the said trust estate and effects in the manner to be specified in any writing under my hand at any time in my life or even upon death-bed." And then taking up that disposition, in his further instructions he takes notice that he had yet to declare what was the manner in which the whole of his estate was to be applied. And then he says: "Being desirous to make my settlement" I "hereby do so according to my wishes, of my whole worldly affairs, and having lately executed a deed of trust in the hands of *John Gillespie*, writer to the signet, whereby I disponed to

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the trustees therein named my whole means and estate heritable and moveable to be by them disposed of as I shall direct by any writing under my hand; and being advised by counsel of my right to do so." Then he takes notice that counsel had told him and advised him that he had a disposing power over that which was a large estate, *Hoddom* and *Knockhill;* and he directs it to be converted into money. And then he continues, "That being I deem a sufficient instruction to sell, I now proceed to instruct my trustees as to the distribution of the price, viz., of the price of the heritage;" but excepting some moveables, as to which there appears to be no doubt that they really do not affect the present question. "I hereby order and instruct my said trustees to make payment of all my just debts which may stand against me at the time of my death, also the following legacies." The legacies are then enumerated, and the enumeration is wound up by these words, "all which legacies I desire my said trustees to pay over from the first and readiest of my saleable estate."

Now, I must say that I have never entertained, after reading these words, the slightest doubt that this is a disposition of the universal corpus of the estate of the testator, a direction to turn the whole of every kind into money, not narrowed or confined by a specific reference to *Hoddom* and *Knockhill*, but extended to the whole of his heritable and moveable property with the exception of the particular moveable property contained in one particular deed; and there is a direction, out of the proceeds, to pay all his debts and all the legacies which are given. And it appears to me that, if it had turned out that *Hoddom* and *Knockhill* were not his, and that he had no disposing power over them, so far as he had other property to answer the legacies, the legacies would have been payable out of his other property. They are, therefore, legacies in the ordinary sense of the term, and the law being that ordinary legacies bear interest from the death of the testator, it appears to me that these legacies must bear interest in that way.

My Lords, the third question is as to the legacy duty. Your Lordships have had before you a facsimile of the holograph will of the testator. He wrote on the third page longitudinally in the margin, "all free of legacy duty," with his name signed thus, "*William*" at the beginning of those words and "*Sharpe,*" at the

end. The words do not extend longitudinally over the whole length of the page; they do not commence at the bottom and they stop short before they come to the top; they are written along a number of lines in which certain of the legacies are given. The Court, in *Scotland*, held, that they are intended to cover and to free from legacy duty not all the legacies given by the will, nor all the legacies in this third page, but those legacies which begin with the gift to *George Inglis's* family, along the margin of which these words do not extend.

Now, I have felt great difficulty I must say, as to how these words should be dealt with. Perhaps something might be said in favour of their being so incapable of any certain interpretation that they are void for uncertainty; but I certainly cannot arrive at the conclusion of the Court below. The Court below seem to have acted upon a principle which was entirely arbitrary. The testator might, if he had pleased, have accompanied these words with some signs, something in the nature of a circumflex, to point out what legacies in the will they were to apply to, if he did not intend to apply them to all the legacies. But, he not having done that, I must construe this as an independent sentence written in the margin of the will of the testator. Now what does the sentence say? "all free of legacy duty." As I took the liberty of observing in the course of the argument, the substantive to be supplied to the word "all" must be "legacies" and the sentence must be "all legacies free of legacy duty." If that is the sentence, then, the testator not having limited the application of it by any sign or mark, or by other words, I can only arrive at the conclusion that it means all the legacies given in his will. Therefore, upon that point, I should submit to your Lordships that the interlocutor of the Court below should be varied in that respect also.

What I propose, therefore to your Lordships to do is, to make these orders:—On the first appeal to reverse the interlocutor so far as appealed against and to declare that the Court ought on the special case to have found that Sir *Thomas Kirkpatrick* is entitled, as one of *Roger Kirkpatrick's* brothers, to receive payment of a legacy of £1000 under the provision of *William Sharpe's* instructions to his testamentary trustees, in addition to the share of the residue bequeathed to him; and inasmuch as if the costs were to

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come out of the residue it would be making the party who succeeds pay a part of those costs, to order that the Respondents should pay the costs of that appeal. On the second appeal to reverse the interlocutor as to interest and as to legacy duty, so far as appealed against, and to declare that the Court ought to have found that the first parties are bound to pay to all the legatees interest upon their respective legacies from the death of the said *William Sharpe* at the rate of £5 per cent. per annum, and that the marginal note or addition by the said *William Sharpe* on the 3rd page of his instructions to his trustees, dated the 13th of June, 1870, relative to his trust disposition and settlement, as to payment of legacy duty on the legacies bequeathed by him, applies to all the legacies given in his will. My Lords, with regard to the second appeal, as the two questions of difficulty in it have been clearly created by the testator, I propose to your Lordships that all parties in the appeal should have their costs out of the estate of the testator.

LORD O'HAGAN:—

My Lords, on the question raised by the first appeal, I find it impossible to concur with the majority of the learned Judges in the Court of Session.

Our duty is to ascertain the true intention of the testator, and to ascertain it from his words. We are not at liberty to indulge in fanciful speculation as to his purpose if those words are clear; and we must not substitute our own notions of justice or expediency for those which, on a fair and reasonable interpretation of them, he appears to have entertained.

Now, I think it quite manifest that, under Mr. *Sharpe's* instructions to his testamentary trustees, Sir *Thomas Kirkpatrick* is entitled to the legacy of £1000 as one of *Roger Kirkpatrick's* brothers. To each of them that sum was bequeathed. He was the eldest of them; and the words designate him as distinctly as if he had been specifically named. I do not see, if there was nothing more in the matter, the smallest ground for doubt as to his title; and I observe that Lord *Ormidale*, for himself, declared it to be clear that Sir *Thomas* was included amongst the brothers who were the objects of the testator's bounty, and of whom, confessedly, he was one.

If, then, the bequest was, so far, complete, what is there in the rest of the paper to nullify it or call it into question? Absolutely nothing, but the gift of the testator's residue to his nephews, of whom Sir *Thomas Kirkpatrick* was one. How could the addition take away that which was already vested? Or, on what principle of construction can we determine that the testator's intention was not to bestow a double bounty, when, in clear terms, he did bestow it?

I concur with Lord *Cranworth*, in the case which has been cited (1), that if there be two legacies to the same person, and if there be circumstances which satisfactorily indicate that the testator really meant only one to be received, the legatee cannot take both of them. But, in that case, the legacies were both pecuniary, and there was reason for holding that the verbal repetition had not been intended to make them cumulative in fact.

Here, it is quite otherwise. There is a gift of money and a gift of the residue of the entire estate, real and personal; and there is, in my mind, nothing to shew that the one was not meant to be superadded to the other. I repeat, that we are not to speculate curiously as to a testator's objects, if he has spoken plainly; and it is not necessary to find a reason for these gifts if they are made in terms intelligible, unequivocal, and capable of enforcement. But if it were, I see no difficulty in supplying such a reason. The Appellants have urged that Mr. *Sharpe* has indicated in his trust disposition some doubt as to his right to devise the real estate of which he had possession. He had consulted counsel upon the point; and his trustees, after his death, were obliged to institute proceedings in the Court of Session to settle it. They succeeded. But in such a state of affairs, and with such a doubt suggested to his mind, was it not reasonable that Mr. *Sharpe* should provide for his nephew,—the bearer of a title and the head of a family,—some certain provision, whatever might be the issue of a possibly doubtful controversy as to a portion of his estate? And was it wonderful that he should guard against the consequences of loss or diminution of the residue, by bestowing a legacy which was to belong to Sir *Thomas* independently and at all events? As I have said, the words being clear, we are not

(1) 4 H. L C. 304.

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obliged to sustain their operation by any such suggestion; but it seems to me quite reasonable, and sufficient, at least, to overbear the presumption on which some of the learned Judges seem to have founded their conclusion, that the "enormity" of the value of the residue was in itself enough to negative and make incredible an intention of giving the pecuniary legacy in addition to it (1).

I am therefore, of opinion, as to the first point, that Sir *Thomas Kirkpatrick*, as one of *Roger Kirkpatrick's* brothers, is entitled to the legacy of £1000 in addition to his share of the residue, and that the judgment of the Court of Session should be reversed with costs.

On the points which have been raised by the second appeal, I concur with the opinions expressed by my noble and learned friend, and substantially for the reasons which he has given.

I shall only add, as to the interest on the legacies, that they were to be paid, in the testator's words, "from the first and readiest of the saleable estate," that they were not chargeable only on the heritable property, or dependent for their payment on the realisation of it, and that, according to the law of *Scotland*, as admitted on both sides, the interest should, in my judgment, be paid not merely from Martinmas, but from the period of the death of the testator.

Besides, as has been noted, the doctrine of constructive conversion is applicable to the case, and that that doctrine is the same in *England* and in *Scotland* is apparent from *Erskine's* statement (2):—"Heritable estate directed to be sold and destined to a particular person or persons, or for a particular purpose, becomes moveable as soon as the direction is binding." Here, the testator indicates, as strongly as he could, a wish that the trust estate should be realised, and the legacies discharged, in the shortest possible time. The sale was to be as soon "as it can conveniently be done," and the proceeds to be distributed with the least avoidable delay. The "heritable" estate, therefore, became "moveable" at once on his death; and the legacies, which vested also on his death, had attached to them the right to interest from that period.

(1) Scotch Cases, 4th Series, vol. v. p. 380.
(2) Nicolson's Ed. vol. i. p. 293 (Ed. note).

On the third point, as to the marginal note, I see no good reason for limiting the generality of its terms,—"*all* free of legacy duty,"—or confining their operation merely to the legacies of the servants. They are on the third and last page of the testamentary paper. They begin immediately opposite to the end of the bequests, running upwards. They are not opposite to *all* the legacies to servants; and the page on which they are written has material portions dealing with the other legacies in continuation from the preceding page. The words themselves would reasonably apply to "all" the legacies; and I do not find in their local position any proper ground for limiting their application. This part of the case is very obscure. The words are not unequivocal, and the placing of them is not decisive of their meaning. The provision, such as it is, might, perhaps, be impeached as void for uncertainty, but the case has not been argued on that ground. And if we are driven to give a definite effect to it, I think, with some doubt and hesitation, that the weight of reason is against the limited application which has been made, and that, if it operate at all, it ought to operate on all the legacies.

I am, therefore, of opinion that on the second and third questions, as on the first, the appeal should be allowed and the judgment reversed.

LORD SELBORNE:—

My Lords, with respect to the appeal of *Kirkpatrick* v. *Bedford* I agree with Lord *Gifford's* opinion; and I do not wish to add anything to what has been already so well said by your Lordships.

With respect to the question (in the second appeal) of interest, I think the sound construction of the holograph will, taken in connection with the preceding deed of trust of the testator's whole moveable and immoveable estate (to which it refers, and which by anticipation refers to it), is, that both the debts and the legacies were to be paid out of a common fund, arising from the proceeds of the sale of the immoveable, and from the moveable estate. No motive is apparent, in the holograph instrument, for separating the proceeds of the immoveable from those of the moveable estate; and, by the preceding instrument, both had been brought into

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one fund, and had been made subject, *primo*, to one "of these liabilities": viz., the payment of debts. The holograph instrument begins with a declaration of the testator's intention to make a complete settlement of his "whole wordly affairs," and it says (in effect) that he is thereby about to give that direction, as to the disposal of his "whole means and estate, heritable and moveable," which had been contemplated by the prior deed. And what he gives, after payment of debts and legacies, is the "residue" of his "whole estate."

The words relied upon by the Respondents in the second appeal (and I must own that I was myself, at first, led astray by them) are those which immediately follow the particular directions as to the sale of the testator's heritable property: viz., "That being, I deem, a sufficient instruction to sell, I now proceed to instruct my trustees as to the distribution of the price, viz., of the price of the heritage." But it does not follow, because he says that the price of the heritage is to be distributable in the manner which follows, he therefore meant that alone to be so distributable. The contrary, I think, is shewn by the words of exception, applicable to the separate deed as to moveable, which is also, in like manner, excepted in the ultimate gift of the residue; and I cannot read the express direction for the payment of all the legacies out of "the first and readiest" of his "saleable estate" as applicable to anything less than the whole and every part of the estate, moveable and immoveable, which was capable of being sold, and which was all directed to be sold by the preceding deed. The right, therefore, to interest from the testator's death, clearly follows. But it must not be supposed that I should have thought otherwise, even if these legacies had been payable out of the proceeds of the testator's heritable property only. That heritable property is directed to be sold out and out, "immediately, or as soon after" the testator's "decease as" the trustees "possibly can find to be practicable." If possible, therefore, it was to be sold immediately; and, under these circumstances, the right and interest of the legatees who were to be paid out of the proceeds of the sale, would also, in my judgment, be immediate. I see no reason at all why the words of Lord *Thurlow*, in *Hutcheon* v. *Mannington*:—

"If he had given any time, I agree, that the intention is to

prevail, if it can be found out (though a testator cannot make an executor answerable for interest, beyond what the law has done); but he must give me some rule to go by. Suppose he had given a real estate in the manner you specify, it is clear that it will neither depend upon the caprice of the trustee to sell, for that would be contrary to all common sense, nor upon his dilatoriness; in some way it may be sold immediately; but I should not inquire, when a real estate might have been sold with all possible diligence; for it might be the very next day, or that very evening; and therefore the Court always in such a case considers it as sold the moment the testator is dead; for where there is a trust, that is always considered here as done which is ordered to be done; and the Court cannot measure the time. Suppose this property had been in the *West Indies*, instead of the East, it would have required less time to be remitted; still less if in *Jersey* or *Cumberland;* and if only 100 miles off, it would have cost a journey of two days at least. In this case it is an immeasurable purpose. I can do nothing with it; and it must be considered as vested from the death of the testator" (1).

which were lately referred to with approbation in your Lordships' House in the case of *Minors* v. *Battison* (2), should not be applicable to a trust of this sort, under the will of a Scotch as well as an English testator.

As to the legacy duty, I agree with the construction which my noble and learned friend on the woolsack has placed on the words "all free of legacy duty" added in the margin of page 3 of the will; and I have only to add, that, if their exact local position is to be regarded, they stand opposite to the end of a series of legacies introduced in the preceding page by the words "*also the following legacies,*" and the word "*all,*" with which they begin, corresponds with the words "*all which*" with which the last of the lines written opposite to them ends.

On the First Appeal.

Judgment of the House.—Ordered and Adjudged, That the interlocutor of the Lords of Session, of the 20th of December, 1877, so far as complained of in the said appeal, be, and the same is

(1) 1 Ves. 366.
(2) 1 App. Cas. p. 452.

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hereby reversed; and it is Declared, That the Court ought on the Special Case to have found, That Sir *Thomas Kirkpatrick* is entitled, as one of *Roger Kirkpatrick's* brothers, to receive payment of a legacy of £1000 under the provisions of *William Sharpe's* instructions to his testamentary trustees, in addition to the share of residue bequeathed to him; And with this Declaration, That the cause be, and the same is hereby remitted back to the Court of Session to do therein as shall be just and consistent with this Declaration and Judgment: And it is further Ordered, That the Respondent the Reverend *William Kirkpatrick Riland Bedford* do pay or cause to be paid to the said Appellant the costs incurred by him in respect of the appeal to this House.

On the Second Appeal.

Judgment of the House:—Ordered and adjudged, That the interlocutor of the Lords of Session, of the 20th of December, 1877, be, and the same is hereby reversed as to interest and as to legacy duty, so far as complained of in the said appeal: And it is Declared, That the Court ought to have found that the first parties are bound to pay to all the legatees interest upon their respective legacies from the date of the death of the said *William Sharpe* at the rate of five per cent. per annum till paid, and that the marginal note or addition by the said *William Sharpe* on the third page of his instructions to his trustees, dated 13th June, 1870, relative to his trust disposition and settlement, as to payment of legacy duty, applies to all the legacies thereby given or bequeathed by him; and with this Declaration, It is Ordered, That the cause be, and the same is hereby remitted back to the Court of Session in *Scotland* to do therein as shall be just and consistent with this Declaration and Judgment: And it is further Ordered, That all parties to this appeal do have their costs out of the estate of the testator.

Lords' Journals, 15th November, 1878.

Agent for Sir *Thomas Kirkpatrick*: *J. C. Stogdon.*
Agents for the Rev. *Riland Bedford*: *Grahames & Wardlaw.*
Agents for *Charles J. Bedford* and Another: *J. & J. Graham.*

[PRIVY COUNCIL.]

GREAT LAXEY MINING COMPANY, LIMITED . . . . . } DEFENDANTS;

AND

JAMES CLAGUE . . . . . PLAINTIFF.

J. C. 1878 Nov. 26.

AND CROSS APPEAL.

ON APPEAL FROM THE COURT OF CHANCERY, ISLE OF MAN.

Compensation.

Case in which compensation for damage done to an estate was awarded once for all, so as to take away any right of action for subsequent damage against the Defendants, who were held to be not wrongdoers, but persons exercising their rights of mining operations over the land of the Plaintiff, subject to paying compensation for the permanent injury thereby occasioned to the said estate.

Williams v. *Groucott* (1) distinguished.

APPEAL and cross appeal from a judgment, order, and decree of the Court of Chancery, *Isle of Man* (June 2, 1876); and from an order and decree of the said Court (Nov. 2, 1876). By the said order and decree of the 2nd of June, 1876, which was made in a suit brought by the complainant against the Defendants, it was amongst other things ordered that the Defendants should pay unto or for the use of the complainant the sum of £214 15*s.*, subject to be reduced to £100 in case the Defendants forthwith erected a permanent and sufficient stone wall round the reservoir of the Defendants mentioned in the decree. By the said order and decree of the 2nd of November, 1876, which was made upon a petition to the said Court by the complainant, it was amongst other things ordered and adjudged that the said decree or judgment of the 2nd of June, 1876, should be rectified, and that the Defendants

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 4 B. & S. (1863) 149.

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should only pay to the complainant the sum of £150 and costs to be taxed, and that in case the Defendants should within two months erect the permanent and sufficient stone wall in the said order mentioned, the Defendants should only pay to the complainant the sum of £35 5*s.*, with costs to be taxed. The facts are fully stated in the judgment of their Lordships.

Mr. *Benjamin*, Q.C., and Mr. *Crompton*, for the Appellants.

Mr. *Cohen*, Q.C., and Mr. *Sherwood*, for the Respondent.

The following cases were cited: *Williams* v. *Groucott* (1); *Backhouse* v. *Bonomi* (2); *Duke of Buccleuch* v. *Wakefield* (3); *Aspden* v. *Seddon* (4); *Caledonian Railway Company* v. *Lockhart* (5).

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

In this case the Plaintiff Mr. *Clague* was the owner in fee simple of a farm in the *Isle of Man*. The defendants are a mining company who, under a grant from the Crown, were authorized to enter his lands in order to conduct their mining operations, paying him compensation for damage done. He brought a suit in the Chancery Court of the *Isle of Man*, claiming compensation in respect of the damage which he had suffered from their works, which he laid at £150. There were various heads of damage; but that with which we have principally to deal arose from their construction in his land of a reservoir. The Defendants admitted many of the allegations of the bill, and, among other things, they state in their answer that they commenced to dig and excavate a portion of the Plaintiff's estate and to deposit rubbish on the surface, "and also formed and constructed a reservoir or dam for water on the said lands of the complainant, and damaged and injured and appropriated to their own use certain timber trees," and so on,—and that they erected fences on complainant's said lands; that by

(1) 4 B. & S. (1863) 149.
(2) 9 H. L. C. 503.
(3) Law Rep. 4 H. L. 377.
(4) Law Rep. 10 Ch. 394.
(5) 3 Macq. H. of L. 808.

the continuance of their said works and operations they have continued to permanently damage and injure the said lands, and complainant's estate and interest therein; and that they are ready to pay him compensation for all the loss and injury sustained by him in the premises.

By the terms of an order made by the consent of both parties, it was decreed that a jury shall inquire into, ascertain, and assess the amount of damage and injury done to the lands of the complainant by means of the Defendants' works in the bill mentioned, and report thereon for the information of the Court.

The jury came to a finding in these terms: "Allowed to enable Respondent to erect 540 yards of permanent stone fencing around the reservoir, £114 15*s*:" then follow other sums in respect of "land permanently injured," "severance of road," and other injuries, amounting to £100, making the total award of damages £214 15*s*. Upon this finding of the jury a judgment was given by the Court in these terms: It is therefore hereby ordered and decreed that the Defendants do forthwith pay unto or for the use of the complainant the said sum of £214 15*s*., the amount of the said verdict, subject to be reduced to £100 in case the Defendants forthwith erect such permanent and sufficient stone wall round the said reservoir." It appears that the Plaintiff thought that such a judgment could not stand, inasmuch as he had only claimed £150; and he accordingly prayed that the judgment which had been entered in accordance with this finding of the jury should be modified. His petition states that "On the hearing of the said cause, complainant's counsel claimed a judgment of this honourable Court for the sum of £150 only, explaining that, although the said verdict was for a higher sum, inasmuch as complainant had only claimed £150 by his bill, and as Defendants might claim credit for a temporary fence, which had been made by them, as proved by the evidence taken on the said issue, complainant would only move for judgment for the said sum of £150, with costs;" and he accordingly prayed that the judgment be amended. The Court reconsidered the case, and finally gave this judgment: "The Court is of opinion that the said judgment of the 2nd of June last should be rectified, and that the said Defendants should only pay to the complainant the said sum of £150, and costs to be

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taxed; and that in case the Defendants do within two months erect a permanent and sufficient stone wall round the excavation for a reservoir in the proceedings mentioned, that then they should only pay to complainant the sum of £35 5*s.*, being the balance of the said sum of £150 after deducting £114 15*s.*, which the jury have estimated as the cost of building a permanent wall round the reservoir, with costs to be taxed; and the same is so ordered and adjudged accordingly."

The mining company appealed against this judgment, and also against the former judgment, on the ground that the Plaintiff is only entitled to £100, and that he is entitled to no damages in respect of the reservoir in consequence of the alleged necessity of building a permanent stone fence round it. The Plaintiff filed a cross appeal relating to the form of the decree, which will be referred to presently. The main question is that raised by the Defendants.

It appeared that the Defendants had made a fence consisting of wooden posts, with some ironwork, which was, and probably would be for some years, sufficient to prevent the Plaintiff's cattle from falling into the reservoir. The Defendants' contention is that the Plaintiff was not entitled to damages in respect of the reservoir, inasmuch as he had suffered none; that if his cattle had fallen into it, or should fall hereafter into it, that would be a subject of damage; that it might even be a subject of damage if he were unable to place his cattle upon the land adjoining the reservoir, owing to the danger of their falling into it; but that until he was actually injured in one these ways he had no claim to compensation. On the other hand, it was contended on the part of the Plaintiff that the compensation he had obtained was awarded him once for all for the purpose of indemnifying him in money for the injury which his estate had permanently suffered in consequence of the construction of the reservoir, which must be regarded as a permanent work requiring a permanent fence. Indeed one of the witnesses for the Defendants appears to put the Plaintiff's case in very much the way in which the Plaintiff himself puts it. This witness, a Mr. *Lace*, says, in his cross-examination, "A stone wall would be the proper permanent fence; and if the Plaintiff is to take it with the present fence on it, he ought to have a permanent

stone fence. Suppose the damages now to be got are to be taken in full for all future damage in respect of the works now done, and the company not bound to keep up the fence, he ought to be allowed in addition the cost of a stone fence." This appears to have been the view of the jury. According to their Lordships' understanding of the case, the jury measured the pecuniary injury to the Plaintiff by the sum which he would have to expend in order to put himself in the same position as if no reservoir had been made on his land; and that this sum was £114 15*s.*, the cost of erecting a permanent stone fence. This view was adopted by the Chancery Court of the *Isle of Man*, and their Lordships concur in it. Indeed they regard the finding of the jury as a finding on a question of fact, within their competence. They have assessed the damage the Plaintiff has sustained, and their assessment is not the worse because they have communicated the principle on which they proceeded and the measure which they adopted.

The case appears to stand very much on the footing of the Defendants having bought of the Plaintiff the right to maintain a reservoir in his land without fencing it for the future, and without being liable to any further compensation.

Their Lordships, regarding the main question as substantially one of fact, do not think it necessary to go at any length into the examination of the authorities which have been quoted, decided upon very different facts. The case most nearly bearing upon the present is the case of *Williams* v. *Groucott* (1), the effect of which may be shortly thus stated: *A.* was in occupation of the land, *B.* was in occupation of the minerals, and had a right of access to them without paying compensation. He dug a shaft in pursuance of that right, but fenced it so carelessly and inefficiently that a horse of the Plaintiff fell into the shaft and was killed. It was held that the Plaintiff was entitled to compensation, chiefly upon the strength of the maxim "*Sic utere tuo ut alienum non lædas.*" The Defendant there had a right to dig his shaft; but he had not a right to dig it, or to maintain it, in such a manner as to be dangerous to his neighbour who occupied the surface of the adjoining land. The present is not an action against a wrongdoer for a trespass, or against a person negligently and improperly exercising

(1) 4 B. & S. 149.

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a right so as to injure the rights of another. It is a claim against persons who are exercising their undoubted rights,—not negligently or improperly, but subject to a condition which did not exist in the case which has been quoted, namely, that they should pay compensation for damage done. That compensation has been assessed by a competent tribunal once for all, which puts the Plaintiff in as good a position as if the damage of which he complains had never been done. After receiving that compensation he will have no right of action for any subsequent damage he may suffer from the same cause. These observations, in their Lordships' view, entirely distinguish the two cases.

It only remains to refer to the cross-appeal preferred by the Plaintiff. The Plaintiff maintains that the first part of the decree awarding him £150 and his costs is right; but that it is wrong in going on to give the Defendants an option within two months to erect a permanent and sufficient stone wall round the excavation for a reservoir, and in further ordering that if they do so they shall only pay to the complainant a sum of £35 5*s.*, being the balance of £150, inasmuch as it is not the duty of the Defendants to erect a wall, but simply to pay to the Plaintiff the money value of the injury which he has suffered; and further, that to reduce the claim of the Plaintiff to £35 5*s.*, in the event of the Defendants erecting the stone wall, is at variance with the finding of the jury that he is entitled to £100 irrespective of such cost.

It appears to their Lordships that these objections to the form of the judgment are valid, and they are disposed to give them effect. The judgment will therefore be modified by striking out so much of it as follows the words "costs to be taxed."

Their Lordships will therefore humbly advise Her Majesty that the appeal of the Defendants be dismissed, that the appeal of the Plaintiff be allowed, and that the judgment be modified as hereinbefore described, and that the Plaintiff have the cost of both appeals.

Solicitor for Appellants: *F. W. Adams.*
Solicitors for Respondent: *Johnston & Harrison.*

[PRIVY COUNCIL.]

RAMESHUR PERSHAD NARAIN SINGH . PLAINTIFF;

AND

KOONJ BEHARI PATTUK AND ANOTHER . DEFENDANTS.

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Nov. 8, 9;
Dec. 3.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Artificial Watercourse—Right to the Flow of Water—Presumption.

The right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle. In the former case each successive riparian proprietor is *primâ facie* entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin.

Wood v. *Waud* (1) approved.

Held, in this case that the plaintiff's legal right to the enjoyment of water overflowing from an artificial reservoir through an artificial watercourse on his neighbour's (the defendant's) land should be presumed from the circumstances under which the same were presumably created and actually enjoyed; subject to the Defendant's right to the use of the water for the purpose of irrigating his lands by proper and requisite channels and other proper means.

APPEAL from a decree of the High Court (Aug. 18, 1874) reversing a decree of the Subordinate Judge of *Gya* (July 31, 1873), and dismissing the suit of the above-named Appellant.

The facts of the case are stated in the judgment of their Lordships.

The object of the suit was to have established an alleged ancient right as against the Respondents, his neighbouring proprietors, to have certain of the Plaintiff's villages, five in number, irrigated out of a "tâl" or artificial reservoir of water existing on the Respondents' land of *Mahooet*, and to have certain dams erected

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 3 Ex. 748; 18 L. J. (Ex.) 305.

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and channels for water cut by the Respondents removed and filled up, and to have a channel by which the Plaintiff alleged he had been in the habit of receiving water for irrigation re-opened, and the Respondents perpetually restrained from wasting the waters of their "tâl," or from ever discharging its waters, except towards the Plaintiff's villages and through that particular channel.

The Respondents, in substance, resisted the Plaintiff's claim on the ground that the "tâl" in question was kept up by them on their own land for their own irrigation, and was supplied by the "collected rain water" which ran into it, and that they were entitled to use that water for their own benefit, and that the Plaintiff had no right such as he claimed.

The Subordinate Judge deputed an Ameen to visit the ground and make a map and local investigation. The general effect of his report was that the Plaintiff's irrigation had suffered from the grandees or dams which the Defendants had raised, and from the passages which they had cut to let the water flow out of their "tâl" towards their own lands.

The Subordinate Judge directed that the Plaintiff's claims be granted, and ordered that a decree be given to the Plaintiff, and the right to irrigate the lands of mouzah *Chahul*, &c., with the water of the *Mahooet Tál;* that the outlet which, contrary to long-established usage, has been recently dug on the west of the tâl for carrying the water to the *Nuddi Ponwar*, be filled up, and the new "kurrah" issuing out of the eastern kunwa lying between the spots marked [native character] and [native character] in the Ameen's map be shut up; that the grandees Nos. 1 and 2 be thrown down, and the Plaintiff be authorized to keep clear the passage for water from the *Mahooet Tâl* to the reservoir of the bund of mouzah *Chahul*, and that the Defendants be for ever prevented to let out the water of the tâl of *Mahooet* towards the villages of any proprietors excepting those of the Plaintiff, and that the cost, besides interest at 8 annas per centum per mensem, from the date of the decision to the day of payment, be charged to the Defendants.

The High Court (*Phear* and *Morris*, JJ.) reversed this decision, and were of opinion "that the Plaintiff had failed to make any such right as would entitle him to restrain the Defendant from

the use of the water which passes along the channel from the tâl *Mahooet* to the tâl *Chahul*, and that therefore the Plaintiff's suit ought to be dismissed." They "accordingly reversed the decision of the Lower Court, and dismissed the Plaintiff's suit with costs in both Courts."

Mr. *C. W. Arathoon*, for the Appellant, contended that according to the razinamah of the 6th of April, 1831, whenever there was any necessity for discharging the water of *Tâl Mahooet*, it ought to be discharged towards *Tâl Chahul*, and in no other direction, and anyhow the Respondents were bound thereby not to open the said tâl towards the river *Ponwar*. The evidence and the Ameen's report established the ancient prescriptive right of the Appellant to irrigate his mouzahs out of water from *Tâl Mahooet;* and the acts recently done by the Respondents in placing dyber (grandees) in the eastern khonwa to divert the water into the *Bahaween* river, and in cutting an outlet on the west of *Tâl Mahooet*, were done with a view to hinder the Appellant from the just and rightful use of the water by him, and not, as supposed by the High Court, to irrigate their own lands. The Respondents had not an unqualified right to the water in the *Tâl Mahooet*, and it was a mistake to say that the Plaintiff sought to restrain them altogether from the use of it.

Mr. *Doyne*, for the Respondents, contended that the Appellant had failed to shew any ground on which he should be held to have acquired a right to interfere with the Respondents' use and enjoyment of their own water. The reservoir in question was an artificial one, the Respondents were not claiming exclusive right in a natural stream, the whole irrigation was merely artificial, and therefore the Appellant had no right to prevent their diverting at their own discretion the waters of their own reservoir for the irrigation of their own lands. [SIR MONTAGUE E. SMITH:—Do you contend that there can be no right acquired by user in an artificial channel?] See *Arkwright* v. *Gell* (1), which is an authority in the negative. [Mr. *Arathoon* referred to *Holker* v. *Poritt* (2). SIR MONTAGUE E. SMITH:—If an artificial water-course is allowed for some time to empty itself on another's land,

(1) 5 M. & W. 203. (2) Law Rep. 8 Ex. 107.

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his consent thereto is implied, and it may have been for a corresponding advantage to him.] See *Gale* on Easements [2nd Ed.] p. 181 h. [SIR ROBERT P. COLLIER referred to *Magor* v. *Chadwick* (1).] It is contended that the overflow upon a neighbour's premises gives that neighbour no right to a continuance of the overflow, even though it has lasted for a century. Reference was then made to *Wood* v. *Waud* (2), and *Mason* v. *Shrewsbury and Hereford Railway Company* (3). The intention of the Respondents was not to hinder the Appellant's use of the water, but to irrigate their own fields, in consequence of which the water was drained away to the *Bahaween* river. [SIR MONTAGUE E. SMITH:—But it may have been that originally there was a natural overflow of the river on the Appellant's land, and that you were allowed to interfere with it on terms of the Appellant having the water after you.] The particular channel which leads to the reservoir is an artificial one. It is merely a case of storing water for the dry season, and the water comes down to the reservoir in the rainy season by this channel. [SIR MONTAGUE E. SMITH:—There seems to have been something like a general system of irrigation, by a succession of tanks, giving rise to the presumption of a general agreement. It is a strong thing to say that a person whose land has been irrigated for so many years has no right.] It is not shewn that the Appellant contributes in any way to the maintenance of tank *Mahooet*, or could complain if the Respondents allowed it to go to ruin. There is no presumption of any grant to him, or of any right being vested in him. If any right, what right? A right to an overflow after Respondents have had the full use of all the water to any extent they please. [SIR MONTAGUE E. SMITH:—No; the right to overflow after you have used the water for certain purposes—*i.e.*, for irrigation.] It is most difficult to say what is overflow or excess water, what is the proper farming discretion, as it were, as to its user, whether a person who has an unlimited right to use water for irrigation purposes uses too much.

Mr. *Arathoon* replied.

(1) 11 Ad. & E. 585. (2) 3 Ex. 748; 18 L. J. (Ex.) 305.
(3) Law Rep. 6 Q. B. 578.

Dec. 3. The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH :—

In this suit the Appellant (Plaintiff below), the owner of mouzah *Chahul* and four other mouzahs, complained of the diversion of water, which, as he alleged, ought to flow from an adjoining estate belonging to the Defendant, called mouzah *Mahooet*, to his own.

Mahooet lies to the south of the Plaintiff's mouzahs, and the land falls in a northerly direction from *Mahooet* towards them.

A large reservoir, called *Mahooet Tâl*, formed by artificial embankments, has existed for a long time in the Defendant's mouzah. It appears to be fed partly by water which is brought from a natural river by artificial channels, and partly by the collection of the rainfall on the adjoining land, and was undoubtedly created for irrigating purposes. A large khonwa (overflow channel) has been cut on the eastern side of this tâl running in a northerly direction, by which, and by other channels, water from this tâl has flowed to another and lower tâl constructed at the northern extremity of mouzah *Mahooet*, and mainly upon it, called *Chahul Tâl*, from which last tâl the water is carried by several channels to mouzah *Chahul* and the other mouzahs of the Plaintiff, for the purpose of irrigating them.

According to the evidence in the case, this system of irrigation has existed beyond living memory.

The complaint of the Plaintiff is that the Defendant has placed two grandees or dams in the khonwa above described, and has also cut a new channel from the northern part of the khonwa, the effect of which is to prevent the water in the khonwa from flowing to the *Chahul Tâl*, and to divert it altogether from his mouzahs. He also complains that the Defendant has prevented the water issuing from the tâl on its western side from flowing to his land as it had formerly done, and has carried it into or in the direction of the River *Ponwar*.

The Plaintiff does not dispute the right of the Defendant to use the water of the *Mahooet Tâl* for irrigating that mouzah, but, subject to that use, claims, as a right, that the overflow water of the tâl and the surplus water, after irrigating the Defendant's

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mouzah, shall be allowed to flow in the accustomed manner to his mouzahs.

The defence, as their Lordships understand it, is twofold. In the first place, the Defendant denies the Plaintiff's right to any of the water flowing from the tâl; and, secondly, he contends that if any right exists, it is to the overflow of the tâl only, and that he has not infringed this limited right.

The subordinate Judge passed a decree in favour of the Plaintiff, declaring him to have the right to irrigate the lands of his mouzahs with the water of the *Mahooet Tâl*, and giving relief against what he found to be wrongful diversions of the water in the manner which will be hereafter commented upon.

Upon appeal to the High Court this decree was reversed. The Judges of that Court seem to have considered that the Plaintiff had put his claim in such a way that, if affirmed, it would deprive the Defendant of the use of the water of *Mahooet Tâl* for irrigating his own mouzah. Their Lordships, however, do not understand the claim to be so extensive as it was thus assumed to be. It does not very distinctly appear whether the Judges of the High Court meant to decide that the Plaintiff had not such a right as they considered him to have claimed, or that he had established no right whatever to the flow of any of the water issuing from *Mahooet Tâl*. They rested their judgment, however, in a great degree on the fact that the tâl and khonwa are artificial works erected on the Defendant's own mouzah.

There is no doubt that the right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle. In the former case each successive riparian proprietor is, *primâ facie*, entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter, any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin. The above distinction seems to be now clearly established, for, although it was said by the Court of Queen's Bench, in the

case of *Magor* v. *Chadwick* (1), that it was no misdirection to tell the jury "that the law of watercourses is the same, whether natural or artificial," it was held in a subsequent case, which appears to their Lordships to be correctly decided—*Wood* v. *Waud* (2)—that this expression is to be considered as applicable to the particular case, and that, as a general proposition, it would be too broad. On the other hand, it appears to their Lordships that the proposition that a right to the use of water flowing through an artificial channel cannot be presumed from the time, manner, and circumstances of its enjoyment, is equally too broad and untenable.

It was said by the Court in *Wood* v. *Waud* (3):—

"We entirely concur with Lord *Denman*, C.J., that 'the proposition that a watercourse of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been originally artificial, is quite indefensible;' but, on the other hand, the general proposition that, *under all circumstances*, the right to watercourses, arising from enjoyment, is the same, whether they be natural or artificial, cannot possibly be sustained. The right to artificial watercourses, as against the party creating them, surely must depend upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it is created. The enjoyment for twenty years of a stream diverted or penned up by permanent embankments clearly stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration of a person's property, and presumably of a temporary character, and liable to variations."

In a case which occurred soon after this decision, *Greatrex* v. *Hayward* (4), Baron *Parke* shortly states the principle thus:—

"The right of the party to an artificial watercourse, as against the party creating it, must depend upon the character of the watercourse and the circumstances under which it was created."

(1) 11 A. & E. 586.
(2) 3 Ex. 748; 18 L. J. (Ex.) 305.
(3) 3 Ex. at p. 777.
(4) 8 Ex. 293.

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In the case then in question the Court considered that the watercourse was of a temporary nature only, and that no right had been acquired by an enjoyment of twenty years.

In a subsequent case the Court of Queen's Bench directed a new trial, on the ground that the jury might have been misled by the direction of the learned Judge who tried the cause, to the effect that if the stream were an artificial one no right whatever could have been acquired in it. The Court held the direction was incorrect, "because" (in the words of the Court) "although it may have been an artificial watercourse, it may still have been originally made under such circumstances, and have been so used, as to give all the rights that the riparian proprietors would have had, had it been a natural stream": *Sutcliffe* v. *Booth* (1).

What then, is the character of the reservoir and watercourses now in dispute, and what are the circumstances under which they were presumably created, and have been actually enjoyed? In the first place, as a question of fact, the *Mahooet Tâl* appears to be of a permanent nature. Next, the construction of the *Chahul Tâl*, which receives the surplus water of the upper tâl, by means of the khonwa and other channels, indicates that a permanent and connected system of irrigation for what are now the Plaintiff's and Defendant's mouzahs, beneficial to both estates, was by these means provided. The fact that this lower reservoir, which seems to have acquired the name of the *Chahul Tâl*, was built mainly on the Defendant's mouzah, leads irresistibly to the conclusion that it was constructed by, or with the consent of, the then owner of that mouzah; and it is evident, from its situation, that its main, if not only, use was to store water for the convenient irrigation of the Plaintiff's mouzahs. Then it is proved that the water has been used and enjoyed for irrigating these mouzahs from a time beyond living memory. It appears to their Lordships that, from all these facts, a presumption fairly arises that this enjoyment had an origin which conferred a right.

It may be that at the time when this system of irrigation was adopted the mouzahs now belonging to the Plaintiff and the Defendant formed one estate, and if so, on severance, the right to the continued flow of the water in the accustomed channels would

(1) 32 L. J. (Q.B.) 136.

arise and subsist (see on this point *Watts* v. *Kelson* (1)); or, if the mouzahs were always separate, it may be that, by the construction of the *Mahooet Tâl*, water was intercepted which would naturally have flowed to *Chahul*, and that this or some other consideration existed, which led to an agreement between the proprietors respecting the use of the water.

Other circumstances were proved which support the presumption of a legal right to the enjoyment of the water.

In 1831 proceedings were taken in the Criminal Court of zillah *Berar* by the owners of *Chahul* against some ryots of *Mahooet* in consequence of their having closed the khonwa from *Mahooet Tâl* to *Chahul Tâl*, which led to a razinamah being come to, dated the 6th of April, 1831, between the Elakadars of the two mouzahs. In that agreement the khonwa is described as being then an ancient one. It recites that disputes arose respecting "the closing of a long standing khonwa of water of the tâl of mouzah *Mahooet*." The arrangement come to is thus expressed:—

"Now between our client aforesaid and the said Rajah *Saheb* a compromise has been made in this manner: that when the water of the 'tâl' of mouzah *Mahooet* aforesaid is about to overflow, and there happens to be any necessity for discharging the same, at that time our client aforesaid shall discharge the water of the said 'negar' towards the 'tâl' of mouzah *Chahul*, &c., through the course of the long standing 'negar,' which the Elakadar of *Chahul*, &c., declares to be a 'kunwa'; that they shall not open it towards the River *Ponwar* or in any other direction. And that the power of closing and opening the 'negar' of the 'tâl' of mouzah *Mahooet* aforesaid, rests with the Elakadar of the said *Mahooet*.

"As *Moulvi Kasim Ali*, 'Elakadar' of mouzah *Mahooet*, has acknowledged the 'kunwa' of 'tâl' *Mahooet* towards the mouzah *Chahul*, &c., therefore a mutual adjustment has been effected, and the contents of the razinamah are true."

The effect of this arrangement seems to be that the overflow of the tâl shall be always discharged through the khonwa, and in no other direction. This agreement appears to refer only to the

(1) Law Rep. 6 Ch. 166.

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overflow water discharged from the tâl through the khonwa (which was then apparently the only matter in dispute); but it is a clear acknowledgment of a right to this overflow. This is made plain by the statement that "the Elakadar of mouzah *Mahooet* has acknowledged the khonwa of *Tâl Mahooet* towards the mouzah *Chahul*."

It was objected that this razinamah does not bind the proprietor of *Mahooet;* but although it was apparently made between tenants, it seems to have been subsequently acted on, and may be properly used to explain the character of the enjoyment of the water.

The parties were again before the Criminal Court in 1864; the Elakadar of *Mahooet* being on this occasion the complainant. What then occurred appears in the following record of the proceedings:—

"Case in respect of the dispute for the use of the water of *Tâl Mahooet.*

"It is evident that the property in dispute lies in mouzah *Mahooet,* and is known by the name of tâl.

"It appears that both parties claim the right to use the water collected in this tal. The point at issue is this: Whether one party alone has the right to the water, or both the parties are entitled to the use of it? It seems that a protracted period has elapsed, that a dispute had occurred regarding this very tal between the parties concerned in the present case. From the razinamah (deed of compromise) filed by the second party, against the genuineness of which the first party has no reason to object, the above dispute appears to have been decided as follows: That the people of mouzah *Mahooet* had entered into an arrangement with the opposite party to allow the water of the tâl aforesaid to flow towards the *Tâl Chahul,* and not to allow the same to flow in any other direction. This proves that although the tâl is situated within the land of the first party, and although by virtue of the razinamah, the first party is vested with the power of discharging or withholding the water, yet the opposite party is entitled to the use of the said water when it is once discharged. Therefore it is

"Ordered, that according to sect. 320 of the *Criminal Procedure Code,* the first party shall not exclusively hold possession of the

water, the subject of litigation, till the said first party obtain a decision from a competent Court declaring that he is entitled to hold possession without the participation of any other person."

The *Mahooet* proprietors do not seem to have challenged this decision of the magistrate in the Civil Court.

The map produced by the Elakadars of mouzah *Mahooet* in the course of the proceedings just referred to, affords strong evidence in support of the claim of the plaintiff, that the overflow of the tâl, and also the surplus water remaining after the irrigation of the Defendant's mouzah, ought to flow to the *Chahul Tâl*, without being diverted by the Defendant, except for irrigating mouzah *Mahooet*, and it seems to their Lordships that the Subordinate Judge was correct in attaching great importance to this map. The witnesses for the Plaintiff, to whom this Judge gave credit, also prove a continuous use and enjoyment of the water.

It is not inconsistent with the Plaintiff's claim that the power of fixing the time for letting off the overflow from the *Mahooet Tâl* should reside with the Defendant. The necessity for this operation would obviously occur in the rainy seasons, and it is apparent upon the evidence that in these seasons a considerable quantity of water is let off, which runs down to the *Chahul* reservoir, and is stored there.

Their Lordships therefore are of opinion that the Plaintiff has established a right to have the overflow water of the *Mahooet Tâl* discharged into the khonwa, so that it may flow through it towards the *Chahul Tâl*; and also a right to the flow of the surplus water towards the tâl as heretofore. But they think that his whole right is subject to the right of the Defendant to irrigate the lands of mouzah *Mahooet*, and to take by proper channels and other proper means so much of the water as may be proper and requisite for such purpose.

Their Lordships will now consider the evidence of the Defendant's interference with these limited rights.

As to the diversion by means of the two grandees, and the new channel on the eastern side of *Mahooet*, the Ameen has found, and the evidence (to which credit is given by the Subordinate Judge) supports his finding, that the two grandees, No. 1 and No. 2, obstruct the flow of water from the khonwa into the channels

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which lead to the reservoir of *Chahul*, and thus divert the water which would otherwise have flowed to it, and cause it to run into the new channel cut by the Defendant in a north-easterly direction, by which it is ultimately discharged into the river *Bahaween*.

The Defendant does not deny this diversion, but asserts that it was done to irrigate his own lands.

It is, however, found that by the Ameen that neither of the grandees nor the new channel is required for this purpose, and in this also his report is corroborated by the evidence. The Subordinate Judge of *Gya*, by whom the Ameen was examined, has adopted his findings, and has also come to the conclusion that these obstructions were made to injure the Plaintiff.

The judgment of the High Court does not disturb the above conclusions of fact, and indeed passes them by, the learned Judges being of opinion, as already stated, that the Plaintiff had failed to establish the right he claimed.

The Subordinate Judge has ordered that these obstructions should be abated, and their Lordships agree in this respect with his judgment.

As to the alleged diversion to the west, the Subordinate Judge seems to have considered that the Defendant had made a breach in the western bank of the tâl, and cut a new passage to carry the water along the western side of his fields to the River *Ponwar*, and he has ordered this assumed new passage to be closed. This part of the decree seems to have been made under a misapprehension of fact. The Ameen, as their Lordships understand his report, finds that no breach had been made in the western bank of the tal, but he does report that two nalas had been formed, which carried the water to the River *Ponwar*. It is not very clear, upon the Ameen's report, whether these nalas were cut by the Defendant or were naturally formed. He does, indeed, also find that there is a passage for the water to go "to the west of the River *Ponwar*." This cut or passage, it is to be observed, is not mentioned in the plaint. Even if it had been complained of, their Lordships think that the evidence of any diversion of water by these means to the west is too obscure to warrant a decree directed against any specific act, and, therefore, the decree of the Subordinate Judge, so far as it directs the closing of the assumed

new passage, ought not to stand. If, however, any acts have been done on the western side of *Mahooet* contrary to the declaration of right which their Lordships will advise Her Majesty to make, the injunction, which they will also advise, will embrace such acts, and enable the Plaintiff to compel their discontinuance.

On the whole case, their Lordships have come to the conclusion that the decree of the High Court cannot be maintained. They are also unable to affirm in its entirety the decree of the Subordinate Judge. In that decree the right is declared in terms which are, in their opinion, too wide and general, and they have already observed that the specific order to close the assumed new western channel is supported neither by allegation nor by sufficient proof.

They also think that it was not correct to insert in the decree a declaration of the Plaintiff's right to scour the khonwa. *Primâ facie*, and in the absence of evidence to the contrary, such a right is presumed by law to be incident to the right to the flow of the water, but no issue was raised on this point, nor does it appear that any effort of the Plaintiff to cleanse the watercourse has been obstructed by the Defendant.

Their Lordships will therefore, humbly advise Her Majesty to reverse both the decrees below, and in lieu thereof to direct that a decree be passed in favour of the Plaintiff, declaring that the Plaintiff has a right in the overflow of water discharged from the *Mahooet Tal*, whenever the same is discharged by the Defendant, and that such overflow ought to be discharged into the khonwa on the eastern side of the said tâl, and to flow through the same towards the *Chahul Tâl* in the accustomed manner for the purpose of irrigating mouzah *Chahul* and the other four mouzahs of the Plaintiff mentioned in the plaint; and also declaring that after the Defendant's right to the use of the water of the said tâl for the purpose of irrigating the lands of mouzah *Mahooet* by proper and requisite channels and other proper means has been satisfied, and subject thereto, the water which may remain after such use by the Defendant, ought to flow, in the accustomed channels and manner, towards the *Chahul Tâl* for irrigating the said mouzahs of the Plaintiff, without being diverted therefrom, otherwise than by such diversion as may be occasioned by the irrigation of the

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lands of mouzah *Mahooet* in a due and proper manner as aforesaid; and also that by the said decree it be ordered that the grandees marked No. 1 and No. 2 in the Ameen's map be removed, and that the new kurrah from the said khonwa shewn in the same map, from the spot marked by the letter *alif* to the spot marked by the letter *ba* be closed; and that it be further ordered that the Defendant be enjoined not to discharge or divert the overflow of the *Mahooet Tâl*, or the water remaining after irrigating mouzah *Mahooet*, as aforesaid, in any direction or manner contrary to the above declaration of right.

Their Lordships consider that the Plaintiff is entitled to receive from the Defendant his costs incurred in the Court of the Subordinate Judge of *Gya*, but as an appeal to amend and limit the decree of that Court became in their opinion necessary, they think that the parties ought to pay their own costs respectively in the High Court, and they will advise Her Majesty accordingly.

The Appellant will have the costs of the appeal to Her Majesty.

Solicitor for the Appellant: *T. L. Wilson.*
Solicitors for the Respondents: *Watkins & Lattey.*

[PRIVY COUNCIL.]

DAME ADELAIDE CATHERINE AUBERT DE GASPÉ *et al* . . . . . } PLAINTIFFS;

AND

ANTOINE BESSENER AND OTHERS . . . DEFENDANTS.

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Nov. 27, 28, 29, 30;
Dec. 3, 4, 5

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, QUEBEC, CANADA.

[SIX CONSOLIDATED APPEALS.]

Code of Civil Procedure (Lower Canada), ss. 946, 947, 948, *and* 52—*Possessory Action—Nature of Possession required to maintain Possessory Action.*

The object of a possessory "action on disturbance" within the meaning of and governed by sects. 946, 947, and 948 of *Civil Procedure Code of Lower Canada* must be definite and certain, and if a piece of land, must be capable of being distinguished by known if not visible metes and bounds, or by some description within sect. 52 of the same Code. The possession to be proved must be *une possession annale*, and also a possession capable of being the foundation of a title by prescription, continuous and uninterrupted, peaceable, public, unequivocal, and "*à titre de proprietaire.*"

Held in this case that the Plaintiffs had failed to prove such a possession of the land in question as was sufficient to maintain a possessory action.

THIS was a consolidated appeal from judgments of the Court of Queen's Bench, *Quebec, Canada*, which dismissed six actions brought by the Appellants against the six Respondents.

The Appellants were the heirs of the late Hon. *George Réné Saveur de Beaujeu*, and as such owners of a large tract of forest-land in the township of *Newton*, in the district of *Montreal*. The Respondents were settlers who occupied land in the township on the opposite side of the road which bounds the property of the Appellants, and who, during the winter of 1868–9, cut wood and allowed their cattle to stray on the lands of the Appellants.

The actions were brought by the Appellants to have themselves declared the true possessors of the land up to the road, and for an

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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injunction to restrain the Defendants from further trespass, and for damages for the injuries they had already sustained. The case for the Defendants was that the road did not constitute the real boundary between the properties, and they alleged that they had even before the time mentioned cut wood, dug pits, and allowed their cattle to stray on the Appellants' side of the road, and that they were thus legally in possession of the land at the time of the acts complained of.

The facts of the case and the pleadings are sufficiently stated in the judgment of their Lordships.

The questions decided in this consolidated appeal were as to the character of the possession sufficient to support a possessory "action on disturbance" within the meaning of, and governed by, sects. 946, 947, and 948 of the *Code of Civil Procedure for Lower Canada*; and whether the plaintiffs did in fact have such possession of the land on which the trespasses complained of were said to have been committed.

Mr. *Bompas*, Q.C., and Mr. *Monk* (of the Canadian bar) for the Appellants:—

Upon the evidence the Appellants were in possession of the land in question at the time the acts of the Respondents complained of were committed, viz. on the 23rd of December, 1868. The actions being possessory actions, no questions of title can be raised according to Canadian law. The only question is, whether Appellants or Respondents were, previous to the winter of 1868, in possession of the land adjoining the road in which the trespasses complained of were committed. The letters patent afforded no evidence of the rights of the parties or the limits of their possession. The possession of the Appellants was proved to have extended at one time to the road, and the alleged acts of ownership of the Respondents, if proved, would not have been sufficient to terminate the possession of the Appellants, and would at most have entitled the Respondents to the possession of inclosures actually made by them.

Reference was made to sects. 946, 947, 948 of the *Civil Procedure Code of Lower Canada*, and the distinction between actions on disturbance and actions for repossession relied upon. As to

what acts constitute, according to French and Canadian law, such a possession as entitles the person doing them to bring a possessory action, it was submitted that when possession has once been taken of uncultivated land it is considered to be retained by the mere intention to do so, unless possession is taken by another. Such possession is held to extend up to the known or visible boundaries of the property of which possession is taken; and adverse possession cannot be claimed over an undefined portion without known or visible bounds by single acts of ownership, such as the straying of cattle or cutting wood. The possession of the original possessor is not the less peaceable, continuous, and public, because of abortive attempts to turn him out. The disturber must shew that he has successfully gained possession of a particular plot, and has held it continuously for a year and a day. Reference was made to *Pothier, Traité de la Possession*, Arts. 1, 2, 3, 26, ch. iv. sects. 39, 41, 55, 76; *Dalloz, Répertoire, "Action Possessoire,"* sects. 195, 221, note; *Troplong, "Prescription,"* vol. i. No. 250; *Domat*, book III. tit. VII. sect. 2, No. 23; *Cotelle, Cours de Droit Français* [Ed. 1813], vol. ii. p. 395.

Mr. *Doutre*, Q.C. (of the Canadian Bar), and Mr. *Fullarton*, for the Respondents:—

Upon the evidence the Appellants have not sufficiently proved their possession nor the alleged disturbance by the Respondents. Such possession as has been attempted to be made out on behalf of the Appellants was not continuous, peaceable, public, or unequivocal, and was not the possession required by sect. 2193 of the *Civil Code of Lower Canada*. It could not have been continuous, when the Respondents were pasturing cattle, cutting wood, making wells, and doing other acts of ownership for several years prior to the institution of this action; nor peaceable, when they were impleaded during the same period in respect to boundaries, and the Municipal Council were Petitioners to rectify the line of road; nor public, when they were met with open resistance a week before the actions brought; nor unequivocal, when it was acquired by force. Nor did it comply with the provisions of sect. 52 of the *Civil Procedure Code*; see also sects. 1107 and 941 of the same Code. Reference was also made to *Le Compte, Traité Théo-*

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rique et Pratique des Actions Possessoires, sects. 219, 221, 226. The possession must also have been for at least a year and a day before the acts of disturbance complained of: see *Le Compte*, sect. 597, p. 419. The following authorities were also referred to in reference to the nature of the possession required to be proved by the Appellants: *Troplong, Droit Civil expliqué*, "*Prescription*," sects. 237, 238, and following; *Bélime, Droit de Possession*, sect. 14. [SIR JAMES W. COLVILE referred to *Troplong, Droit Civil expliqué*, sects. 305, 306.] *Pothier, Traite de la Possession*, sects. 85, 105, 328. For Canadian authorities: see *Bourget* v. *Morin* (1); *Hunter* v. *Bank* (1811) (2); *Harbour Commissioners of Montreal* v. *Hall et al* (3); *Robertson* v. *Stuart* (4); *Lalonde* v. *Daoust* (5); *Fournier* v. *Lovoie* (6); *Graham* v. *Kempley* (7); *Millar* v. *Millar* (8). See also *Curasson, Traité des Actions Possessoires*, pp. 36, 37, 38. Two questions therefore arose on the face of the case; first, is it one of disputed boundaries between conterminous proprietors, in which case an action of *bornage*, or a petitory action in which title can be proved, is the proper remedy? Second, is it a case of dispute as to some independent and ascertained piece of land, in which case the *locus in quo* must be defined with greater certainty as to its limits than is apparent on the pleadings in this case before a possessory action can be brought, and also the possession proved as contended for above. See *Guillemette* v. *Larochelle* (9).

Mr. *Bompas*, Q.C., replied:—

Possession if proved for a year and a day need not be peaceable nor continuous, but only not violent, secret, or precarious: see *Civil Code of Lower Canada*, sect. 2199. So far as the *Code Napoléon* lays down a contrary rule, it does not prevail in *Canada*. He referred to *Dalloz*, tit "*Prescription*," No. 219, as to the condition of peaceable possession. Acts which prevent possession being peaceable must be done with the avowed purpose of asserting title, or

(1) 1 Quebec Law Rep. 191, in Steph. Quebec Law Digest, col. 34.
(2) 1 Revue de Legislation, p. 380.
(3) 5 Low. Can. Jur. 155.
(4) 13 Low. Can. Rep. 462.
(5) 8 Low. Can. Jur. 163.
(6) 15 Low. Can. Jur. 270.
(7) 16 Low. Can. Jur. 56.
(8) 15 Low. Can. Rep. 229.
(9) 2 Low. Can. L. J. 111, Q. B. 1866; Steph. Quebec Law Digest, col. 21, No. 124.

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be such as if repeated would give rise to prescription: see *Civil Code of Lower Canada*, sect. 2226. [SIR ROBERT P. COLLIER referred to a passage in *Dalloz* which says that the possession must have been peaceable and continuous for a year and a day in order to support a possessory action: *vo.* "*Actio Possessiore.*"]

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The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

The appeals of which their Lordships have now to dispose were preferred to Her Majesty against the judgments of the Court of Queen's Bench in *Canada*, in six different suits. The case of the Plaintiffs, the relief prayed by them, the evidence given,—with some slight variations in that given on the part of the different Defendants,—and the *ratio decidendi* of the Court of Queen's Bench, being substantially the same in all the causes,—the appeals were consolidated by the order of Her Majesty, and have accordingly been heard together upon one case for the Plaintiffs, the Appellants, and one common case for all the Defendants.

These six suits were possessory "actions on disturbance" within the meaning of and governed by the 946th, 947th, and the 948th sections of the *Code of Civil Procedure* for *Lower Canada*. They were actions which correspond with the *complainte en cas de saisine et de nouvelleté* of the old French law, whereby the persons disturbed in the possession of immoveable property sought to be maintained in such possession, and to put an end to the disturbance. The Plaintiffs are the heirs of the late M. *de Beaujeu*, and as such are the owners of a considerable quantity of land, chiefly forest, situate in the fourth range of the township of *Newton;* and the material averments of their declaration in each suit are the following:—First: "That during more than a year and a day before the disturbances or forcible acts of which they complain, the Plaintiffs had been the sole, true, and lawful possessors *animo domini*, and as such in possession peaceable, public, and continuous of lots Nos. 14, 15, 16, and 17, in the fourth range of the township of *Newton*." Secondly: "That the Plaintiffs had been in the possession of the said lands since the death of M. *de Beaujeu*, to whose possession they had succeeded; that he had always

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possessed them up to the time of his decease; so that the possession which they and their predecessors in estate had of these lots went back for a considerable number of years, and was in fact immemorial." Thirdly: "That the Defendant, without any right (*sans aucun droit quelconque*), and with the avowed and malicious object of disturbing the Plaintiffs in their possession, had unlawfully and forcibly entered upon the lots in question in the course of December, 1868, and about the 23rd of that month, and had there, with others, his accomplices or persons employed by him, committed all kinds of acts of violence and depredations upon the said lots; and in particular had thrown down, destroyed, and broken down a fence which was upon those lots, and *separated them in their frontage from the public high road*, and had demolished a house or building which the Plaintiffs were causing to be erected upon one of the lots, and had taken and carried off the materials of this fence and building, in order to appropriate them to himself." It may be mentioned that this particular lot here spoken of was No. 17.

The declaration states other trespasses, which it is unnecessary to set forth particularly, because they are all of later date than that above stated; and it is hardly in dispute that, supposing the possession of the Plaintiffs to have been such as they assert it was, they had been disturbed in that possession. The declaration further alleged that the Plaintiffs had sustained damages to the amount of $1000; and the relief prayed was, that the Plaintiffs might be declared to have been and to be the sole, true, and lawful possessors of the said lots of land, Nos. 14, 15, 16, and 17, in the fourth range of the said township of *Newton*, and that the Defendants might be forbidden and restrained for the future from troubling or disturbing the Plaintiffs in the peaceable possession of the said lands, and might also be condemned to pay to them damages and costs.

In each suit there was a demurrer, with which we need not trouble ourselves, and also a plea, of which the only allegation that need be noticed is, that the alleged line of demarcation upon which the Plaintiffs relied to distinguish the third from the fourth range in the said township of *Newton* never legally existed; that there never had been a demarcation sufficient to determine with

certainty the extent of the respective possession of the parties in this cause. There is no particular allegation in the declaration to which this allegation of the plea seems expressly to point, unless it be that which may be implied from the words "which separated them in their frontage from the high road," that are contained in the statement of the principal trespass. Mr. *Fullarton*, however, argued (and perhaps he is right) that the allegation in the plea was principally intended to shew that the possession claimed was of an uncertain portion of land, and that the true remedy of the Plaintiffs, if they were entitled to any relief, was by action of *bornage*. But, however that may be, the Plaintiffs put in a replication to the plea, and then stated that the line of division between the third and fourth ranges of the said township was well marked and defined by a public road which had been duly authorized and established by the municipal authority of the place, and of which the existence went back to a period of more than thirty years; that the public road which separated the respective lands of the parties in this cause, and which served them as a *chemin de front*, had always been the sole limit, known and apparent, of their respective possession.

Therefore, the case of the Plaintiffs, as made by their declaration and the replication, may be taken to be that they were in such possession as the law requires of lots Nos. 14, 15, 16, and 17, in the fourth range; that those four lots went up to and were bounded by the line of the public road; and that they having been disturbed in their possession of the lots as so defined had a right to bring their action in order to be maintained in it.

It is convenient here to state shortly the position of the different Defendants. The township of *Newton* was divided into different ranges, and these were subdivided into different lots. Their Lordships will have occasion to refer more particularly to the letters patent by which that was done. The lots may be taken for the present to have been so numbered that the lots of the fourth range fronted lots of the third range, having the same numbers, and were only divided from the latter by whatever may have been the boundary between the fourth and the third range. Each of the Respondents holds or claims to hold a small portion of land in one or other lot of the third range. *Lortie* holds land

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in lot 14; *Asselin* in lot 15; *Zavier Levac* and *Joseph Marcou* in lot 16; and *Louis Adam*, under the arrangement, of which so much has been said in the argument, with *Honoré Sauvè*, an admitted holder of land within lot 17 of the third range, claims so much only of the land belonging to *Honoré Sauvè* as is in dispute; that is, so much of *Honoré Sauvè's* land as *Honoré Sauvè* may be entitled to on the south side of the public road. *Antoine Bessener* holds land in No. 18, and is only charged, therefore, with having taken part in the trespasses upon the Plaintiff's alleged land in lots 14, 15, 16, and 17, there being no question in these suits as to lot 18 of the fourth range.

The first case that was tried was that against *Asselin*; and on the 30th of June, 1871, Mr. Justice *Beaudry*, as the Judge of the Superior Court, gave judgment in the Plaintiff's favour. It is obvious from that that the learned Judge took the view which their Lordships have already expressed to be their view of what was to be tried in the cause. The judgment, after mentioning and disposing of the demurrer, says:—"And dealing with the merits of the claim, considering that the Plaintiffs have sufficiently proved that they were in open, public, and peaceable possession of lots 14, 15, 16, and 17 of the fourth range of the township of *Newton*, and that in the year and a day immediately preceding the bringing of the action in this cause the Defendant troubled them in their possession; considering also that the Defendant has not proved a contrary possession, declares that the Plaintiffs are the legitimate possessors of the said lots 14, 15, 16, and 17 in the fourth range of the said township of *Newton*, as bounded by the public road of the third range of the said township, and in consequence restrains the Defendant from troubling them in their possession, and condemns him in costs."

The Defendant appealed from that judgment, and on the 23rd of June, 1873, the Court of Queen's Bench allowed his appeal, and dismissed the Plaintiff's suit with costs; the then Chief Justice, Chief Justice *Duval*, dissenting.

The other five cases were heard in the Superior Court by Mr. Justice *Johnson*, on the 28th of February, 1873, and by consent the evidence taken for the Plaintiff in *Asselin's* case was read as the Plaintiff's evidence in all the five causes. The Defendant in

each produced evidence on his part which varied in some slight particulars in each case. Mr. Justice *Johnson*, in each case, gave a judgment corresponding with that of the Superior Court in *Asselin's* case. The Defendants appealed, and their appeals were heard by the Court of Queen's Bench in September, 1874. The constitution, however, of the Court had since 1873 been greatly changed. The only Judge who heard both the appeal of *Asselin* and these other five appeals was Mr. Justice *Taschereau*. The latter were heard in the first instance before the four puisne Judges, Mr. Justice *Taschereau*, Mr. Justice *Ramsay*, Mr. Justice *Sanborn*, and Mr. Justice *Mackay*. They were equally divided; the appeals with the factums of the parties were thereupon by consent referred to those Judges with the addition of Chief Justice *Dorion;* and on the 21st of December, 1874, final judgment was given in favour of the Appellants, the present Respondents, reversing the judgment of the superior Court, and dismissing the Plaintiffs' suits with costs. Two of the Judges, Mr. Justice *Ramsay* and Mr. Justice *Mackay*, dissented.

The material *motif* of these last judgments was precisely the same as that of the judgment of the 23rd of June, 1873. It is in these words: "Considering that the Respondents" (the present Appellants) "have failed to prove the principal allegations of their declaration, and particularly that during the year and a day before the 23rd of December, 1868—the date at which they allege the disturbances and acts of violence which they impute to the Appellant began—they, the Respondents, had been the only true and lawful possessors *animo domini* in peaceable, public, and continuous possession of the piece of land (*de l'étendue de terre*) upon which they allege that the Defendant has disturbed them, and committed the acts of violence set forth in their declaration."

The broad question then to be determined upon these appeals is whether the Plaintiffs did in fact prove a possession of the land on which the trespasses are said to have been committed sufficient to support their possessory action according to the law of *Lower Canada.*

It will be convenient here to consider shortly what are the requisites of such a possession. Their Lordships have heard very long and very learned arguments on each side touching the nature

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of this possessory action, but they do not think that in this case it will be necessary to wander *inter apices* either of the old French law or of the French law as it now exists in *Canada*.

The first proposition upon which the Respondents' counsel insisted was, that the object of such an action must be definite and certain, and, if a piece of land, must be capable of being distinguished by known, if not visible, metes and bounds, or by some description within the 52nd section of the *Code of Procedure of Lower Canada*. The Plaintiffs do not dispute the applicability of this section, but contend that the description which they have used in their declaration is authorized by the following provision which forms part of it: "If the immoveable forms part of a parish or township, the lots in which are numbered, it is sufficient to state its number." The next proposition contended for by the same learned counsel was, that the possession to be proved by the Plaintiff must be a possession capable of being the foundation of a title by prescription; and, therefore, to use the words of the 2193rd Article of the *Civil Code of Canada*, continuous and uninterrupted, peaceable, public, unequivocal, and "*à titre de propriétaire*," a phrase which is used throughout the Code and in many of the French treatises in opposition to the phrase "*à titre précaire*." Their third proposition was that such possession must have been of at least a year's duration before the act of disturbance complained of; that is, to use the French phrase, that it must have been *une possession annale*. And they shewed very conclusively that if the Plaintiff failed to bring himself within the rules defining the nature of the possession required to support a possessory action, his action would be dismissed, and he would be left either to an action of *bornage*, if the question between the parties was really a question of boundary, or to a petitory action in which he might recover upon proof of title.

The two latter propositions were more or less contested by Mr. *Bompas* on behalf of the Appellants. He argued at some length that it was not necessary to prove a peaceable possession, and he cited authorities on that point. His argument, as their Lordships understood it, came however at last to this, that "peaceable possession" must be taken merely to mean a possession which had not commenced with violence. He also disputed—though he did

not argue that point at much length—the necessity of the *possessio annale*. It does not seem to their Lordships to be material for the determination of the present case to consider the last of these objections, because if the Appellants have made out that they were in possession of this land at all within the meaning of the term "possession" as used in the Code with respect to possessory actions, they were in such possession for considerably more than a year before the trespass.

Their Lordships do not propose to go at length into the law applicable to the case, or the consideration of the various authorities which have been cited. It will be sufficient to remark that the propositions above mentioned, which seem to have been accepted as sound law throughout the proceedings in *Canada*, appear to them to be established.

The declaration is framed consistently with them. They are assumed to be the law governing the case by the judgments both of the Superior Court and of the Court of Queen's Bench.

Moreover, it seems reasonable that the party who relies upon mere proof of actual possession, and does not shew a possession commencing with title, should prove a possession from which title may be presumed, and therefore a possession which, if continued during the period of prescription, would ripen into a title by prescription.

Some of the French commentators, and particularly M. *Troplong*, treat possessory actions as designed for the protection of such a possession when disturbed before the period of prescription is completed.

Their Lordships have now to apply these principles to the facts of the case. The first piece of evidence with which they will deal is the letters patent of 1805, by which the township of *Newton* was first created. These are material, not only as evidence of title which cannot be tried in these actions, but as evidence upon the question of possession. The Plaintiffs' contention is that their Lots 14, 15, 16, and 17 in the 4th range have always been bounded by the public road or by a line corresponding with the direction of that road. If they could establish that proposition, they would go far to prove their possession of the land in dispute; because, being in admitted possession of those lots of the 4th

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range, they would be presumably in possession of whatever, according to the original delimitation of them, was included in them.

The letters patent begin by reciting the creation of this township out of the wild waste and forest lands of the Crown, and in particular that M. *Bouchette*, who was the then surveyor-general, had made a careful survey, and had laid out the boundaries of the whole township, as follows: "The first boundary beginning at a post or boundary erected on the province line"—that is the line dividing the provinces of *Upper* and *Lower Canada*—"at the distance of 17 chains from the boundary of the seigniory of *New Longueuil* marking the south-west angle of the said township of *Newton*, running from thence magnetically north 17 degrees 30 minutes east along the province line 586 chains 25 links to the south-west boundary of the seigniory of *Rigaud*, which boundary marks the north-west angle of the said township of *Newton*, then south, 50 degrees 45 minutes east 794 chains along the division line between the said seigniory of *Rigaud* and the said township of *Newton*, to a post erected for the north-east angle of the said township of *Newton;* thence south 19 degrees west 158 chains along the division line between the seigniory of *Soulange* and the said township of *Newton*, to a post erected on the north-easterly line of the said seigniory of *New Longueuil* marking the south-east angle of the said township of *Newton*; thence north 36 degrees 45 minutes west 368 chains along the division line between the seigniory of *New Longueuil* and the said township of *Newton*, to a post erected on the division line between the said township of *Newton* and the said 1000 acres granted to the Honourable *Joseph de Longueuil;* thence south 59 degrees west 580 chains to the place of beginning, containing about 17,193 acres, and the usual allowance of 5 per cent for highways." Hence it appears that the township, as a whole, was defined and bounded in exact conformity with the plan which was annexed to the letters patent, and has been the subject of so much discusssion at the bar, with one exception only, viz., that the first line mentioned was not exactly the line which appears upon the plan. It ran in the direction of north 17 degrees 30 minutes east, instead of being, as put in the plan, parallel with the south-easterly boundary, which ran south

19 degrees west. The letters patent then go on to state the creation of this tract of land into a township to be called *Newton*, and that applications for grants of land within it had been made and assented to, and then follows this material recital:—"And whereas in obedience to our said royal instructions, and by virtue of the aforesaid warrant of survey to him for this purpose also directed, our said surveyor-general hath surveyed and divided the said township of *Newton*, as nearly as circumstances and the nature of the case would admit, into eight ranges or rows at equal distances of 73 chains 5 links, numbered from the north towards the south, from No. 1 to No. 8 inclusive, and hath subdivided the said ranges or rows into lots of 28 chains 75 links in breadth, numbered from the west towards the east; that is to say, the first range into six lots; the second range into thirteen lots; the third range"—and this is material—"into twenty-one lots; the fourth range into twenty-six lots; the fifth range into nineteen lots; the sixth range into eleven lots: the seventh range into six lots; and the eighth range into three lots; making together 105 lots, containing 200 acres each, and the usual allowance for highways, save always and except the irregular lots which are bounded and abutted as follows." The irregularity of certain lots was of course occasioned by the irregularity of the boundaries of the whole township; and the letters patent contain an elaborate description of each of such irregular lots. To some only of these is it necessary to refer. This is the description of lot 17 in the third range: "Lot No. 17 in the third range is bounded and abutted as follows: that is to say, beginning at a post standing on the division line between the third and fourth ranges marked 16, 17, being the division line between the lots Nos. 16 and 17, running from thence north 19 degrees east till intercepted by the north-east line of the said township of *Newton*, thence south 50 degrees 45 minutes east, till intersected by the division line between the lots Nos. 17 and 18; thence south 19 degrees west till intersected by the division line between the third and fourth ranges, and from thence north 71 degrees west to the place of beginning, containing about 179 acres, including the usual allowance for highways." Again, the following is the description of lot 17 in the fourth range: "Lot No. 17 in the fourth range is bounded and abutted as follows; that is to

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say, beginning at a post standing at the extremity of the south-west line of the said township of *Newton* on the division line between the third and fourth ranges, running from thence south 71 degrees east, till intersected by the division line between the lots Nos. 17 and 18, thence south 19 degrees west till intersected by the south-west line of the said township of *Newton*, and from thence north 36 degrees 45 minutes west to the place of beginning, containing about 48 acres, including the usual allowance for highways." A comparison of these descriptions clearly shews that the two lots, and therefore the two ranges at that point, were divided by a line at right angles to the longer sides of lot No. 17 in the third range, and that those sides, like all the perpendicular lines in the plan dividing the lots, were intended to be parallel to the boundary line dividing the township of *Newton* from the seigniory of *Soulange*. The last-mentioned fact appears conclusively from the following description of lot 27 in the fourth range: "Lot No. 27 in the fourth range, bounded and abutted as follows; that is to say, beginning at a post standing on the division line between the fourth and fifth ranges, marked 26, 27, being the division line between the lots Nos. 26 and 27, running from thence north 19 degrees east, till intersected by the north-east line of the said township of *Newton;* thence south 50 degrees 45 minutes east along the said line to a post marking the north-east angle of the said township of *Newton*, thence south 19 degrees west along the division line between the seigniory of *Soulange* and the said township of *Newton*, till intersected by the division line between the fourth and fifth ranges."

It is also material to observe that the passages read by Mr. *Fullarton* shew that there was, under the letters patent, a lot numbered 21 in the third range, which was actually granted *eo nomine* to one *Nicholas Graw;* and further, that according to the delimitation of lots made by these letters patent, there was no lot No. 16 in the fourth range, by reason of the angle made by the two southernmost boundaries of the township at the spot where such a lot would otherwise have been. The general conclusions which their Lordships draw from these letters patent, taken by themselves, are the following: First, that the regular and normal lots were a succession of rectangular parallelograms, formed by

the intersection of lines drawn parallel to the boundary between the township and *Soulange*, the direction of which was south 19 degrees west, with the lines dividing the ranges, which last, being at right angles to the former, were in the direction of south 71 degrees east; the dimensions of each such lot being 73 chains, 5 links, by 28 chains and 75 links, and their superficial area being about 200 acres. Secondly, that the northerly boundary of lot 17, and the other lots in question in the fourth range, and therefore the southerly boundary of the corresponding lots in the third range, was the before-mentioned line in the direction of south 71 degrees east, which was, therefore, a continuous straight line in that direction, dividing the two ranges. Thirdly, that there was no Lot 16 in the fourth range, as originally demarcated; and fourthly, that the copy of the plan referred to and annexed to the letters patent is substantially a correct representation of the lots demarcated, as they were described and granted by the letters patent of 1805.

The subsequent history of the township, so far as the evidence goes, is almost a blank until 1852, when the public road, which has been the occasion of these disputes, was first authorized. The proceedings in the municipal council begin at page 139 of the record, and their Lordships refer to them only because they do not seem conclusively to state that the road was necessarily to follow throughout its course the line dividing the ranges without any deviation. At page 143 the municipal council adopt as their own the *procès verbal* of M. *Ranger*, who seems to have been the deputy grand-voyer, and say that it is to be the *procès verbal* of the *chemin de front* between the third and fourth ranges of the township, and of the cross-roads (*chemins de descente*) in the third range, which were to come down and join that *chemin de front*. The *procès verbal* of M. *Ranger* had proposed *un chemin de front*, between the fourth and third ranges of the said township, to be made upon the lots of the third range from the line which separated the said township from the seigniory of *Rigaud*, up to and including an augmentation of the township of *Newton*, of which there is no evidence. This road was to be made, repaired, and kept up by all the proprietors of land and occupants of land in the said third range and of the said augmentation; and then there

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follows a provision as to the bridges. The term *chemin de front, primâ facie* supports the inference that the road was intended to run along the whole line of the boundary between the two ranges. And this, if its *terminus a quo* were one point in the boundary line between the township and seigniory of *Rigaud*, might have been accomplished consistently with the letters patent and the plan. But the terminus of the road is not at that point. And here their Lordships repeat the regret which they have already expressed, that the Plaintiffs should have brought their case into Court without shewing by some plan what is the actual direction of this road, and what is the land in question, and how it is occupied. Of course, the omission to do this is not the fault of those who conduct the appeal, and the Plaintiffs, if their case suffers from it, have only themselves to blame.

All the evidence, however, agrees in this, that at some point this road follows a line, which it is impossible to reconcile with the boundary delineated on the plan. There is great discrepancy among the witnesses as to the precise point of divergence, but there is a general agreement that at some point or other, which, upon the evidence, may be put as lying westward of lot 14, the road does diverge, and proceeds either in a curve or a straight line to its terminus, in a northerly direction, and at an angle with that which appears upon the plan to be the dividing line between the third and fourth ranges. The place upon which the trespasses are said to have been committed, and the land in possession of which the Plaintiffs seek to be maintained, lies between the line of the road and that line upon the plan.

Their Lordships have already intimated that when dealing with this plan and the letters patent, they mean to give no judgment on that which is not before them, viz., the title to the lands; but that if the Plaintiffs could have proved that their lots as originally granted did go up to the line of the road, by shewing that that contention was consistent with the letters patent and the plan, they would have given strong and almost conclusive proof of the possession necessary to maintain their action. That they have failed in this seems to their Lordships to be mathematically demonstrable. Mr. *Bompas* in his reply has dwelt upon certain alleged discrepancies in the written figures as to the contents of

the different lots which are to be found on the plan; and has thence argued that the plan is not to be depended upon. It is not, however, the plan alone which he has to meet. It is impossible, without rewriting, as it were, the whole of the careful and elaborate description of the different lots which is contained in the body of the letters patent and defines the subjects of the subsequent grants, to reconcile the line thence appearing to be the boundary between the ranges with a line going off from it at an angle, whatever that angle may be. It is further to be observed that in order to support the contention that the line of the road was the original boundary of the ranges, it is necessary, first, to account for the existence in the fourth range of a lot No. 16, of which the letters patent make no mention, and for the disappearance from the third range of lot No. 21, which was described and granted as part of that range by the letters patent.

The Plaintiffs then have to make out by evidence other than and independent of the letters patent, that their lots did go up to this alleged boundary. They rely strongly upon the testimony of *Daoust* and *Biron*, and others, who speak to the line of the road having followed the old posts of demarcation between the lots which had existed from the time at which the lots were first defined. There is a want of evidence as to the present existence of those posts; but it may nevertheless be true that up to the point of divergence the road, and the ditches which belong to it, did follow the original boundary between the third and fourth ranges as demarcated by such posts. But this evidence, so far as it relates to the line of the road after it makes the admitted crook, is, in their Lordships' opinion, far too loose to be set against the clear inferences to be drawn from the letters patent and the plan. Their Lordships then must hold that the Plaintiffs have failed to establish that the line of the road was the original boundary of their lots Nos. 14, 15, 16, and 17.

It has, however, been argued that the Plaintiffs have at least proved such actual possession and enjoyment of the disputed gore of land as leads to the inference that the line of the road has become the reputed acknowledged boundary of their lots; and have thus substantially established the truth of the allegations in their pleadings.

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In support of this argument a good deal of reliance has been placed upon certain leases granted by them or their ancestor to various persons, and in particular to one *Wattier*. Of the leases granted to him, the first is dated the 28th of September, 1865, the second, the 30th of November, 1866. There is also a lease of the 17th of November, 1866, granted to *Abraham Sauvé*, and one of the 9th of March, 1867, granted to *Paul Arsenau*. It may be remarked of those leases that they only profess to deal with the lots 14, 15, 16, and 17, in ranges four and five, and that in the description of those lots the three first speak of their being bounded in front by the "cordon" which separates the fourth from the third range, a description which seems to refer to the line of delimitation as originally laid down.

The lease to *Arsenau* speaks of the boundary as "*par devant au trait quarré*." We do not exactly know what is the precise significance of that term, but it seems to point to some line at right angles with another, and certainly not specifically to the road. The last lease, which is that to the *Monpetits*, and which was granted when the dispute was hot, and almost immediately before the trespass, is the only one in which the land is expressly said to be "*tenant en front au chemin de front actuellement pratiqué du troisème rang du dit township*." That does, no doubt, specifically mention the public road as the boundary.

The evidence of what was done under these leases is far from satisfactory. *Wattier's* leases were to cut wood within the limits described in them, and he does, no doubt, swear that he has cut wood on a portion of the land in dispute, but it does not clearly appear to what extent he went. He says that he did not go up to the road, but that he went within an "*arpent et un quart du chemin en question*." A witness however, on the part of the Defendants, says that *Wattier* did not go within four or five arpents of the road. The evidence of what was done by the other lessees is not more satisfactory, and such as it is, is met by evidence on the other side that during the currency of the leases certain acts were done on the part of the Defendants which were apparently done *animo domini*, so that the possession cannot be said to have been unequivocal or undisputed. In weighing the evidence of both sides, the nature of the land in question must be considered. It is clear on

the evidence that it only partially cleared forest land, and it is impossible, therefore, to expect that kind of proof of possession which we should have, supposing the land were all settled and in the occupation of tenants cultivating it and paying rent to one party or the other.

Then there is the evidence of *Biron*, a sort of agent or head forester, and of his subordinate foresters, speaking no doubt to a considerable period of time, as to their treating people who came upon this land as trespassers, thus asserting the rights claimed by M. de *Beaujeu* and his family, as they say, up to the road. This evidence would be of greater weight if the piece of land in dispute was not admittedly contiguous to the other large tracts of land of which the Plaintiffs hold undisputed possession. For if the *Beaujeu* family had put these people on the disputed land as foresters to watch and protect only that particular piece of land, that might be an act implying an ostensible taking of possession; but it is obvious that this establishment of foresters was kept up for the whole of their estate, and therefore the mere existence of such an establishment ceases to be very material. Those witnesses no doubt speak of treating persons who came upon the land from the third range as trespassers, but their testimony is met by evidence on the other side to the effect that many of the acts which the Plaintiffs treat as trespasses and other acts of user and occupancy were done under a claim of a right. Moreover, they themselves admit that the Defendants or those under whom they claim, have done such acts as the digging of rude wells, the establishment of an oven on the south side of the road, the erection of pigsties, the pasturing of cattle and the like, and even the running of fences upon what the Plaintiffs say was their land in order to keep in their cattle; which latter act may have been really intended to prevent the cattle from straying beyond what their owners asserted to be the boundary of the third and fourth ranges. If the land in question had been clearly shewn to have been in the undisputed possession of the Plaintiffs, these acts might have been explained in the way the witnesses seek to explain them by saying that they did not seriously affect the Plaintiff's interests, and were therefore permitted to take place. But when it is, to say the least, extremely doubtful whether the land in question was not

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originally in the third range, such acts of ownership become very material as shewing that the occupants or owners of the third range did them *animo domini*, having never abandoned the right of possession which may have originally belonged to them.

A distinction has been taken by Mr. *Bompas*, in his reply, between the actions against *Adam* and those against the other Respondents. It is founded upon the action which in 1857 was commenced by one *Gatien Beauchamp*, who was then in possession of lot No. 17 of the third range against the late M. *de Beaujeu*, claiming to have the boundaries between his lot and lot No. 17 of the fourth range defined. It was an action of *bornage*. The declaration alleged that the parties were contiguous proprietors; that there was no clear boundary between their lands, and that the Plaintiff wished to have such a boundary laid down. The Defendant pleaded that the heritages described in the declaration were not contiguous, but that a public road and the land for a public road divided them; adding, that such land for a road existed as well by virtue of the letters patent erecting the said township as by the *procès verbal* of the Municipal Council of the 13th of December, 1852; and treating the land over which the road passed as the land, not of the Plaintiff, but of the municipality of the township, he insisted that there was no ground for an action of *bornage*. The Plaintiff's action was dismissed, and so far it may be said that the public road was incidentally treated as the known boundary between the lots. It does not appear what evidence was taken in the cause, but the judgment was in these words: "Considering that the Plaintiff has not proved his allegations, and that it is well known that there exists there a road sanctioned, separating the properties of the Plaintiff and the Defendant whereby they are completely separated, the Court dismisses the action." After that the property was sold in execution, and passed to *Honoré Sauvé*. *Honoré Sauvé*, as already has been stated, was in possession of so much of lot 17 in the third range as is north of the road, and he has transferred all rights which he may have to land south of the road to the Defendant *Adam*.

These proceedings are, no doubt, some evidence against *Adam*, but their Lordships do not think they are conclusive upon the question of the Plaintiffs' possession of the land claimed by them

as part of their lot No. 17 as by way of estoppel; and, on the other hand, they find in the evidence of the witnesses for the Defendant, that not only had *Sauvé* exercised acts of ownership of the kind already described on the land south of the road, but that *Beauchamp* himself had done so, and therefore that there had been throughout a disputed possession. Moreover, their Lordships think that it is scarcely possible in these actions to distinguish so much of the land as is said to belong to lot 17, from the residue of the disputed gore of land. They are of opinion that, if this were done, there would no longer be that clear definition of the object of the demand which the 52nd section of the *Code of Procedure* requires; and therefore that the case against *Adam* must stand or fall with the other cases.

Their Lordships do not think it necessary to go at greater detail into the evidence; it is sufficient to say that upon a review and careful consideration of it during the long time which the argument of this case has occupied, they have come to the conclusion that there is no ground for disturbing the finding of the Court of Queen's Bench, namely, that the Plaintiffs have failed to prove such a possession of the land in question as is sufficient to maintain a possessory action. Accordingly their Lordships must advise Her Majesty to dismiss all the appeals and affirm the judgments of the Court of Queen's Bench, with costs.

Solicitors for the Appellants: *Bischoff, Bompas, & Bischoff.*
Solicitors for the Respondents: *Simpson, Hammond, & Co.*

[PRIVY COUNCIL.]

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MELBOURNE BANKING CORPORATION, LIMITED . . . . . } DEFENDANTS;

AND

JOHN BROUGHAM . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Powers of Official Assignee—Release of Equity of Redemption to the Mortgagee—Victorian Insolvency Statute, 1865—*Corporation bound by Agreement not under Seal.*

A release of an insolvent's equity of redemption to the mortgagee is not *primâ facie* beyond the scope of an official assignee's authority; and sect. 27 of the "*Insolvency Statute* 1865," of *Victoria*, clearly contemplates the exercise of such authority.

Where the consideration for such a release is an agreement not under seal by a corporation (mortgagee) to abstain from proving any portion of its debt, and such agreement has been acted on by accepting the release, *held*, that the corporation is bound thereby, and that the consideration has not failed.

APPEAL from an order of *Molesworth*, J. (Aug. 2, 1877) overruling the plea of the Appellants to the Respondent's bill of complaint, and from an order of the Supreme Court (Oct. 8, 1877) affirming the said order of *Molesworth*, J.

The above-mentioned bill and plea are sufficiently set forth in the judgment of their Lordships. For a report of the case in the Court below, see 3 Vict. Law Rep. Eq. 190.

The judgment of *Molesworth*, J., contained the following passage:—

"Official assignees have no power to buy in the right of proving debts. I therefore think *Goodman* could not legally make such a bargain as is alleged. Further, such a bargain would be contrary to the policy of sect. 81 (of the said *Insolvency Statute*, 1865) as to secured creditors, giving the estate the advantage of obliging secured creditors before proving to value both their debts and

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

security by oath and making them liable to be held to their estimate. The 27th section would not, I think, protect dealings palpably illegal. But even if *Goodman* could sell, I think in this case he did not."

The Chief Justice delivered the judgment of the full Court (*Stawell*, C.J., and *Fellows*, J.):—

"The short question in this case is whether a conveyance of an equity of redemption by the official assignee of an insolvent estate to the mortgagee, in consideration of the latter abstaining from proof of any part of the mortgage debt is valid?

"It is not now necessary to consider the validity of a sale and conveyance of an equity of redemption to a mortgagee, before the debt has been valued, under the Act No. 273, s. 81, because we are of opinion that what took place in the present instance was not a "sale" which is authorized by sect. 71. To constitute a valid sale under that Act, it is necessary that there should be a price fixed by the parties or perhaps by a valuation of persons selected by them.

"But in the present case that ingredient is wholly wanting. Assuming the amount provable to have been £3000, a dividend of 5*s.* in the pound would make the nominal purchase-money £750, while a dividend of 10*s.* in the pound would make the nominal purchase-money £1500. It is manifest that the value of the equity of redemption can in no way depend or be affected by the amount of dividend which may chance to be paid in the estate; and if it were worth £1500, and the other assets produced enough to pay only 5*s.* in the pound, it is clear that the assignee would have parted with a property worth £1500, for which in the result he receives only £750. The transaction was little better than a wager on the amount of the dividend. But it was said that if the transaction itself cannot be supported, the defect is cured by sect. 27, which is a panacea for all sorts of excess. We do not concur in that view. The effect of that section is, in our opinion, simply to enable a purchaser to take for granted that all things have been performed necessary to justify the assignee in exercising a power with which, in the performance of them, he is unquestionably clothed; as, for example, that notice has been given under sect. 71. But it does not cover or protect

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transactions which are altogether outside the Act, such, for example, as a conveyance of the estate in consideration of some personal benefit to the official assignee or his family. It was, indeed, contended that such a conveyance even as that would be protected by sect 27, and *Royal British Bank* v. *Turquand* (1) was relied upon in support of that proposition. That case, however, did not decide anything of the kind. It merely decided that compliance with certain conditions precedent might be conclusively presumed as against those exercising a power dependent on their having been complied with. It did not decide that a power which under no circumstances could arise might be deemed to exist as against those who had taken upon themselves to exercise it. This distinction is pointed out in *Irvine* v. *Union Bank of Australia* (2). For these reasons the appeal must be dismissed with costs."

Mr. *Davey*, Q.C., and Mr. *J. D. Wood*, for the Appellant:—

The question is as to the validity of the Appellants' plea. In substance the judgment of the Supreme Court is one upon demurrer. It is said that the agreement and indenture of the 30th of May, 1870, relied on by the plea, were not executed by the official assignee for valuable or sufficient consideration, and were *ultra vires* the assignees. There was however this consideration, that the Appellants having accepted a release of the equity of redemption were under the terms of the verbal agreement precluded from proving against the insolvent's estate for their mortgage debt. The bank might have filed a bill for foreclosure; this would have put the estate to costs, and an easy way of avoiding such costs was to release the equity. In the bill there is no allegation of collusion between the bank and the official assignee, or of any fraud or pretence that the release was anything but a *bonâ fide* transaction entered into by the assignee for the benefit of the estate. It must be taken for granted that the verbal agreement was made, and that the insolvent estate got the benefit of it. It must also be taken for granted that the recitals as to the amount of the debt and the value of the security were true as against the assignee and all persons claiming under him. The Respondent does not claim as the original mortgagor, but as the purchaser from the assignee—

(1) 6 E. & B. 327. 2 Jur N S 664 (2) 2 App. Cas. 366.

he has therefore no better title than anybody else claiming as a purchaser from the assignee; *i.e.*, he took from the assignee such right, title, and interest as were left in him after the release of the equity to the bank. Reference was made to *New Westminster Brewery Company* v. *Hannah* (1), and to sects. 11, 25, 27, and 28 of the "*Insolvency Statute*, 1865." An assignee when made a Defendant to a foreclosure bill often at once disclaims—it is his duty to do so. May he not equally release the equity without a bill being filed? If he offers to disclaim before bill, he is entitled to his costs from the date of such offer. The sale here was of a *minus* quantity, of that which has no saleable value. Reference was then made to sects. 78, 81, 101, and 107 of the above Act. Sect. 81 applies only to the case of a creditor holding a security who desires to prove upon the insolvent estate. A mortgagee may if he chooses come and prove for the balance if he values his security, but he is under no obligation to do so, and there is no power to compel him to come in and prove; all the assignee could do is to file a bill for redemption as the mortgagor could have done. The mortgagee's title is anterior to and independent of the sequestration—he is outside it, and therefore he is one of the persons referred to in sect. 27. There is no prayer to avoid the release. Reference was then made to sect. 40, the latter part of sect 64, and sect. 71. Neither sect. 71 nor sect. 81, nor any other section, prevents an official assignee from releasing the equity of redemption to a mortgage creditor in satisfaction of the debt due to such creditor, and sect. 27 expressly contemplates such a release being made and executed. The corporation having had the benefit of the deed (though it did not execute it) cannot repudiate it. A parol agreement can be enforced against it. *Ecclesiastical Commissioners* v. *Merral* (2); *Mayor of Kidderminster* v. *Hardwick* (3); *Wilson* v. *West Hartlepool Railway Company* (4); *Crook* v. *Corporation of Seaford* (5); *Trainor* v. *Municipal Council of Kilmore* (6); *Re Dallimore* (7); *Lindley* v. *Lacey* (8). The deed as it stands would have prevented the corporation from

(1) 1 Ch. Div. 278.
(2) Law Rep. 4 Ex. 162.
(3) Law Rep. 9 Ex. 13.
(4) 2 De G. J. & S. 475.
(5) Law Rep. 6 Ch. 551.
(6) 1 Wy. & Webb, Eq. 293.
(7) 5 Aust. Jur. 1.
(8) 17 C. B. (N.S.) 578.

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proving except upon terms of giving up the equity of redemption. *Ward* v. *Shakeshaft* (1) illustrates that the assignee ought to disclaim an equity of redemption which is of no benefit to the estate.

Mr. *Benjamin*, Q.C., and Mr. *Everitt*, for the Respondent:—

The mortgagee must do one of two things, he must either prove his claim in the bankruptcy proceedings or else file a bill of foreclosure. Here he was in possession, and no accounts have ever been taken. The usual course in *England* is for the assignee in such a case as this to submit the matter to the Court and not take the responsibility upon himself: *cf. Bankruptcy Act*, 1869, sect. 23. Under the *Insolvency Statute*, 1865, the official assignee of an insolvent estate has not (see sect. 81) any power to release the equity of redemption of mortgaged property to the mortgagee in consideration of the latter abstaining from proof of any part of the mortgage debt; nor has he any power to recognise or deal with any person as a creditor of the estate who has not proved his debt under sects. 78 and 81 of the Act; nor has he under the Act any power to sell, or convey, or release the equity of redemption of the mortgage property to a mortgagee in consideration of the mortgage debt before the debt has been duly proved and the security valued by the affidavit of the mortgagee. See as to the powers of the assignee, sects. 70, 71, 40, 41, 78, and 81 of the Act. The Act provides a mode by which a secured creditor can, if he pleases, retain the security for his debt upon a valuation of that security and proof of debt in respect of which he holds his security; but then he must swear to the correctness of both. Then the Act gives the creditors the right to buy the property at its valuation, not at the amount of the debt. The plea avers that the deed recites that the assignee was satisfied, not that he was satisfied; and it appears that no accounts had ever been gone into, from the recital that the assignee was satisfied that a sum of so much "*or thereabouts*" was owing.

The transactions and deed relied on by the plea of the bank did not amount to or constitute a valid or effectual sale by the official assignee under the provisions of the Act. No proper steps were taken to ascertain the value of the mortgaged property, or to pro-

(1) 1 D. & S. 269.

tect the interests of the creditors, or of the insolvent, as the persons interested in the surplus of the estate placed under sequestration. Neither was there any sufficient or valuable consideration for the agreement and indenture of May 30, 1870. What was there to bind the bank not to prove? There was no agreement under the seal of the corporation, and therefore no mutuality. Reference was made to *Mayor of Kidderminster* v. *Hardwick* (1). It cannot be said that the abstention from proving was a part performance of the contract by the bank; for it is not alleged that the time for proving was passed. Reference was then made to sects. 70, 71, 78, 79, and 81 of the Act of 1865. The official assignee might have avoided and defeated the deed as being made without consideration, and voluntarily, and contrary to his duty as trustee. The Respondent as purchaser from him succeeds to all his rights, and is entitled to treat the deed as ineffectual to defeat his equity of redemption. Sect. 27 of the Act of 1865 does not help the Appellant; it is a protecting rather than an enabling section. Reference was made to *Ex parte King* (2). [Mr. *Wood* referred to *Prosser* v. *Edmonds* (3)]. That case refers merely to an interest, or right of action, to a fund, not to an equitable estate in real property. The sale here was not within the provisions of the Act. Reference was made to *Uppington* v. *Bullen* (4); *Stump* v. *Gaby* (5); *Dickinson* v. *Burrell* (6); *Re Motion* (7); *Adams* v. *Sworder* (8); *Troup* v. *Ricardo* (9).

Mr. *Davey*, Q.C., replied.

1879
Jan. 25.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This is an appeal from a judgment of the Supreme Court of *Victoria*, affirming an order of Mr. Justice *Molesworth*, which overruled a plea filed by the Appellant, the *Melbourne Banking Corporation*, in bar to a bill brought against them as mortgagees in possession of certain sheep runs and other property. The bill

(1) Law Rep. 9 Ex. 13.
(2) Law Rep. 20 Eq. 273.
(3) 1 Y. & C. 481, in notes to *Ryall* v. *Rowles*, 2 White & Tu. L. C. 812.
(4) 2 D. & W. (Ir. Rep.) 184.
(5) 2 De G. M. & G. 623.
(6) Law Rep. 1 Eq. 337.
(7) Law Rep. 9 Ch. 192.
(8) 2 De G. J. & S. 44.
(9) 4 De G. J. & S. 489.

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prayed that an alleged sale by the bank might be set aside, and also for an account of all moneys received under the mortgage upon sales or otherwise.

The facts alleged in the bill, so far as they are material to the question in the appeal, may be shortly stated. The Plaintiff, *John Brougham*, on the 18th of May, 1867, conveyed the property to the bank by way of mortgage, to secure the payment of certain moneys, with power to sell in case of default. The bank, upon default being made, and under an arrangement with the mortgagor, entered into possession. Some time afterwards the estate of *Brougham* was placed under sequestration upon his own petition, and became vested in *John Goodman* as official assignee, by virtue of the *Colonial Insolvency Statute*, 1865. The bill sets out the title of *Brougham* derived from the official assignee (which it may be observed is subsequent in date to the release of the equity of redemption alleged in the plea); it states that on the 13th of December, 1873, *John Kennedy*, as agent of *Brougham*, who had then received a certificate of conformity, purchased from *Goodman*, "for a valuable consideration," the whole of the right, title, and interest of *Goodman* as official assignee in the sequestrated estate. The bill further states that *Goodman* and *John Kennedy* having died, *Jacomb*, who had been appointed official assignee of *Brougham's* estate, and *William Kennedy*, the surviving executor under *John Kennedy's* will, joined in conveying to *Brougham*, by a deed of the 2nd of March, 1877, the whole of the sequestrated estate. The bill charges that the bank pretended that *Goodman* released the equity of redemption to it, and submits he had no power to make such a release, and prays for relief on the footing of the mortgage being still open.

It is to be observed that *Brougham* is suing not on his original right as mortgagor, but on a title derived by purchase from the official assignee.

The plea commences by setting out a verbal agreement between *Goodman* as official assignee and the manager of the bank, who is alleged to be its duly authorized agent, as follows:—

"That after the sequestration of the estate of the Plaintiff as in the bill alleged, and on a day the exact date whereof the Defendant is unable to state, but shortly before the date of the indenture

hereinafter set out, it was verbally agreed between this Defendant by *Walter Robert Johnson*, its manager and duly authorized agent, and *John Goodman*, in the bill mentioned, the official assignee, in whom the estate of the Plaintiff was then vested, that the said *John Goodman* should execute to this Defendant a release of the equity of redemption in the property subject to the security created by the indenture of the 18th day of May, 1867, in the bill mentioned, and that in consideration thereof this Defendant should not prove any debt upon the said estate." It then sets out a deed, dated the 30th of May, 1870 (which, it is alleged, was indorsed on the deed of mortgage), by which *Goodman* conveyed the equity of redemption, and all interest in the property, to the bank. The plea states that in this deed it is recited "that there was due and owing to this Defendant the sum of £18,900, or thereabouts, on the security of the indenture of the 18th day of May, 1867, in the now stating indenture referred to as the within written indenture, and that the whole of the sheep runs or stations, chattels, and premises, which were comprised in and described in or subject to the within written indenture, were valued by this Defendant at the sum of £15,000, or thereabouts, and that the said *John Goodman*, being satisfied that the aforesaid sum of £18,900, or thereabouts, was due and owing to this Defendant, as aforesaid, and that the then value of the property described and comprised in or then subject to the within written indenture did not exceed the sum of £15,000, had elected and agreed to execute the assignment to this Defendant which was thereinafter contained."

It appears to their Lordships that the word "agreed" in the above recital may properly be held to refer to the antecedent agreement, if it was made as in the plea alleged. In the operative part of the deed the conveyance is expressed to be "in pursuance of the said agreement and in consideration of the premises, and of the sum of £18,900, or thereabouts, so due and owing to the said corporation as aforesaid."

The plea then alleges that the bank never proved, or attempted to prove, the mortgage debt under *Brougham's* sequestration.

An answer filed in support of the plea denies the pretences alleged in the bill.

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In discussing the validity of this plea, it must, their Lordships think, be assumed, and the grounds of the decisions in the Courts below do not seem to be inconsistent with such an assumption, that the agreement and release stated in the plea were the result of a fair and honest accounting and bargain, not impeachable on the grounds of mistake or flagrant error, or of fraud upon the official assignee, or collusion between him and the bank to cheat the creditors. If these assumptions are not warranted by the facts of the case, they may be questioned by proceedings proper for that purpose.

The main ground on which the decisions below, and the arguments at their Lordships' Bar in support of them, has been placed is, that, having reference to the provisions of the *Colonial Insolvency Statute*, the release of the equity of redemption was *ultra vires* of the official assignee.

On the other hand, the counsel for the bank contended that there was nothing in the statute to limit the power of the assignee to convey and release an equity of redemption; and that the 27th section of the statute contemplated the exercise of such power, and gave full protection to any person taking such a release from him.

That section is as follows:—

"All deeds which shall be executed by the official assignee for the time being of any insolvent estate, or by the assignee for the time being elected by the creditors and confirmed by the Court as aforesaid and by the official assignee for the time being, purporting to convey, assign, release, or assure any part of the real or personal property of an insolvent to any purchaser or purchasers, mortgagee or mortgagees, or other person or persons in fee simple, or for other less estate or interest, shall be from the time of the date or execution thereof valid and effectual, both at law and in equity, for conveying, assigning, releasing, and assuring such real and personal property in fee simple, or for other less estate and interest in such deed mentioned or expressed, to be conveyed, assigned, released, or assured to the purchaser or purchasers, mortgagee or mortgagees, or other person or persons; and such purchaser or purchasers, mortgagee or mortgagees, or other person or persons, and every person or persons, claiming under him or

them, shall be relieved from inquiring or ascertaining whether the advertisements have been inserted, and meetings of creditors called, or directors of creditors obtained as in this Act provided, notwithstanding the same shall not have been inserted, called, or obtained; and any person who shall deal or contract with, or take any conveyance or other assurance from, any assignee or assignees for the time being of any insolvent estate shall not be bound to inquire into or ascertain the power or authority of such assignee or assignees with respect to such dealing, contracting, conveyance, or assurance as aforesaid; but such assignee or assignees shall for the purpose aforesaid, and as between him or them, and such person or persons, as aforesaid, be deemed and considered as beneficial owners of the real and personal property of the insolvent. But nothing in this part of this Act contained, shall be construed to exonerate any such official assignee, confirmed assignee, or assignee for the time being, as aforesaid, from any liability for the non-observance or non-performance of his duty as such assignee as aforesaid."

It was contended by the learned counsel for the Plaintiff that this section was not an enabling, but a protecting enactment. It is unnecessary in their Lordships' view to define its precise character. It, however, clearly contemplates that the official assignee may release the mortgaged property to the mortgagee. The right to do so would be vested in him by his general powers as assignee, unless controlled by some restraining provisions in the statute. In the absence of any such restriction there seems to be no reason why such a release should not be within his authority. Under former English statutes of bankruptcy it has been a recognised practice for assignees, when a foreclosure suit has been brought or threatened, and the equity of redemption was valueless, to disclaim any interest; and questions have arisen whether, when such a disclaimer has not been made before suit, but by answer, the assignee was entitled to his costs. If such a disclaimer may be made, there seems to be no reason why the assignee, in the case of the equity being worthless, should not release it to the mortgagee before any costs are incurred. In one case where the assignees had not disclaimed until their answer, they put their

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application to be allowed their costs on the ground, "that they would have released the equity of redemption if any application for that purpose had been made to them;" and no doubt seems to have been thrown on the power to make such a release: *Collins* v. *Shirley* (1).

The principal argument on the part of the Plaintiff was based on the contention that the bank was bound to prove its debt, and value the mortgage security in the manner provided by sect. 81 of the *Insolvency Statute*, and that no release of the equity of redemption could be made by the assignee until that had been done. Their Lordships, however, are of opinion that this section is applicable only to mortgagees who elect to come upon the general estate of the insolvent. A mortgagee may stand aloof, if he so pleases, and pursue his remedies under his mortgage. He is in no way bound to come upon the general estate, and his election to do so, in the case of a debt exceeding the value of the security, would of course be a burden on, and not a benefit to it. It is to be observed that the 81st section only requires the creditor to put a value on his security "upon oath" in case "any dispute shall arise about the value of such security," so that even under this section the assignee and the mortgagee might agree upon the value.

Mr. *Benjamin* sought support for his argument from the words of the 78th section:—"Every creditor shall prove his debt by affidavit or otherwise." But this again obviously means no more than that all creditors who come in shall prove in the prescribed manner. A creditor who abstains from proving his debt does so at the peril of losing it, and it is he, and not the estate, who suffers from his inaction.

It was further contended for the Plaintiff that the release was invalid, inasmuch as it did not appear upon the plea that it had been made by the direction of the creditors, and after notice in the *Gazette* as required by sect. 71. This section enacts as follows:—"The assignee shall (subject to the directions of the creditors given in the manner herein provided) forthwith proceed to make sale of the property belonging to the estate, real and personal, giving due notice thereof in the *Government Gazette*, and also such other

(1) 1 Russ. & My. 638.

notice as he shall think fit." This enactment no doubt requires that the directions of the creditors should be followed where such directions have been given; but it does not provide that in all cases such directions must be given. The words in the parenthesis of sect. 71 seem to have reference to the provision in the 40th section relating to the business to be done at the first meeting of creditors wherein it is said, that the majority "shall also give to the assignee such directions as to the management of the estate as to them shall seem meet." The creditors at their meeting may think fit to give no specific directions, and may leave the time and manner of dealing with the property to the assignee.

The enactment in sect. 66 enabling the assignee to call a meeting of creditors, and to require their direction concerning the collection or sale of any part of the estate, has for its object to relieve the assignee from the responsibility of acting on his own judgment when he desires to be so relieved. However prudent and proper it may be for the assignee to obtain the sanction of the creditors, it does not seem to be made obligatory on him to call the meeting.

Moreover, their Lordships think that it ought not to be presumed that in releasing the equity the assignee acted in opposition to any directions given by the creditors, or without directions from them, if directions were necessary. The 27th section *primâ facie* at least affords protection to the transaction.

With regard to the want of notice in the *Gazette*, their Lordships are disposed to think that a transaction of this kind is not such a sale as requires that notice. In one sense it may be regarded as a sale, but they are inclined to agree with the counsel for the Plaintiff, who argued that it was not a sale in the proper sense of the term, and, therefore, that it is not within the scope and meaning of the section in question. Such a transaction as that in question could from its nature only take place between the assignee and the mortgagee, and be the subject of arrangement and bargain between them only. If, therefore, it was competent for the assignee in other respects to enter into it, their Lordships are not prepared to hold that it could be successfully impeached for want of notice in the *Gazette*, even if it could be rightly presumed on these pleadings that no such notice was, in fact, given. But, however this

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may be, the 27th section would *primâ facie* protect the release against this objection.

Their Lordships, having dealt with the authority of the assignee to release the equity of redemption, will now proceed to consider the further objection that the release in question is on the face of the plea invalid for want of consideration.

It was not disputed at the Bar that, assuming the statement in the recitals of the release, viz., that the amount of the debt was about £18,000, and the value of the mortgaged property about £15,000, to be correct, there would be sufficient consideration for the bargain, if the bank had been bound not to prove the balance of the debt; but it was denied that the bank was so bound.

It must be taken in considering this objection that the parties in good faith estimated the value of the security and the amount of the debt as stated in the recitals referred to. The question to be decided is, whether enough appears in the plea to shew that the bank is legally bound to perform its part of the bargain.

The agreement between the bank and *Goodman*, stated in the plea, is to the effect that *Goodman* should execute to the bank a release of the equity of redemption, and that, in consideration thereof, the bank should not prove any debt upon the estate. The agreement is verbal, but is alleged to have been entered into on the part of the bank by *Johnson*, who is stated to be "its manager and *duly* authorized agent." It must, therefore, be taken that *Johnson* was clothed with the proper and necessary authority from the bank (whatever the form of it might be) to make the agreement on its behalf. This agreement having been made, *Goodman* performed his part of it by executing a conveyance and release of the property and the equity of redemption to the bank, as stated in the plea. This release was indorsed on the original mortgage, which was presumably in the bank's possession; and it is averred that the bank never proved its debt upon the estate. If these averments be true, it cannot be doubted that both parties have, in point of fact, acted on and had the benefit of the agreement. But it was objected that, the agreement not being under the seal of the bank, it was not legally binding upon it. Assuming this might be so, whilst the agreement remained executory, it

was contended in answer that after *Goodman* had performed his part of it, by the conveyance and release of the property, the bank was precluded from proving the balance of its debt, and therefore that the consideration had not failed. Their Lordships think that the authorities support this contention. If, when the other party had performed his part of the agreement, and the corporation had taken the benefit, it should seek to repudiate its own part of the agreement, and to prove its debt, such attempted repudiation would amount to a fraud, which a Court of Equity would not suffer to prevail. (See *Wilson* v. *The West Hartlepool Railway* (1); *Crook* v. *Corporation of Seaford* (2)).

In the case cited at the Bar (*The Mayor of Kidderminster* v. *Hardwick* (3)), where the corporation sued the Defendant for refusing to take a lease of certain tolls under an agreement entered into with the corporation, but not under its seal, *Kelly*, C.B., affirmed the principle of the above decisions. He said:—"I will observe that if it appeared in the present case, as in that case (referring to *Ecclesiastical Commissioners* v. *Merral* (4)), that the contract had been performed and carried into effect by both parties, and that the Plaintiff had had the benefit of that performance, the Defendant would, no doubt, have been entitled to file his bill for specific performance." The learned Chief Baron obviously could not have contemplated an entire performance by both parties, but a partial performance only, for otherwise no necessity for a bill for specific performance could arise. But whilst affirming the principle referred to, the Chief Baron held that, in the particular case, no part performance had been shewn before the happening of the breach complained of. In the present case, the official assignee had completely performed his part of the contract by executing the release. That conveyance vested the equitable property in the bank, which not only did not repudiate the conveyance, but accepted it, by allowing it to be indorsed on the original mortgage, and abstaining from proving the balance of its debt, and is now estopped from repudiating it by asserting a title under it on record. (See *The Mayor of Thetford's Case* (5)).

(1) 2 De G. J. & S. 475.
(2) Law Rep. 6 Ch. Ap. 551.
(3) Law Rep. 9 Ex. 13.
(4) Law Rep. 4 Ex. 162.
(5) 1 Salk. 102.

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The observations which have been already made meet most of the reasons advanced in the judgments of the learned Judges below. It is true, as Mr. Justice *Molesworth* observes, that the deed contains no release or covenant not to prove the debt, but that was provided for in the previous agreement, and the combined effect of this agreement and the conveyance was, in their Lordships' view, under the circumstances already detailed, to preclude the bank from proving.

The learned Chief Justice, in his judgment on appeal, remarks that, to constitute a valid sale, a price should be fixed by the parties, and that that condition was not complied with because the value of the equity of redemption is virtually made to depend on the amount of the dividend which may chance to be paid. This reasoning is scarcely applicable to the present case, because upon the figures on which the parties dealt, and which for the present purpose must be assumed to have been honestly arrived at, the equity of redemption was, *ex hypothesi*, of no value.

Their Lordships agree with what the Chief Justice has said respecting the protective effect of the 27th section, but they consider, for the reasons already given, that the release in question is not, *primâ facie*, beyond the scope of the assignee's authority.

Other points have been argued at the Bar. On the part of the bank it was contended that the Plaintiff could not disaffirm the transaction, even if the official assignee might have done so, and, further, that the transaction being at most voidable, some distinct act or proceedings should have been taken to impeach it. The decision, however, at which their Lordships have arrived, renders it unnecessary at this stage of the suit to consider these points.

Their Lordships are fully sensible of the inconvenience of determining the rights of the parties upon a plea which is somewhat bare in its averments, and is itself supported by an answer. Possibly the conveyance and release may be affected by extraneous facts. Whilst, therefore, they are of opinion, for the reasons above given, that the plea ought not to be overruled, they think the proper order to be made is, that the benefit of the plea be saved to the hearing of the cause, the parties being at liberty to

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make such additions to and amendments of their pleadings, not inconsistent with the rules and practice of the Court below, as they may be advised.

Their Lordships will, therefore, humbly advise Her Majesty to reverse the orders appealed from, and to direct that in lieu thereof an order be made as above stated. They think that the costs occasioned by the hearing of the plea in the Courts below should be costs in the cause. The Appellant will have the costs of the appeal to Her Majesty.

Solicitors for the Appellants: *Murray, Hutchins, & Stirling.*
Solicitors for the Respondent: *Keen & Rogers.*

[PRIVY COUNCIL.]

In re BALL'S PATENT.

J. C.*
1879
Jan. 15, 16, 17.

Admissibility of Evidence—Notice of Objections—Rule 6 passed under 5 & 6 Will. 4, c. 83.

It is sufficient, prior to tendering evidence of instances of anticipation, to state the grounds of objection to the extension of letters patent without stating all the particulars of those objections.

IN this matter, which was a petition in the usual form for the extension of the term of certain letters patent granted to one of the Petitioners, *James Ball*, and dated the 2nd of February, 1865, for improvements in the manufacture of sheepshears, a question of practice arose as to the admission of evidence, having regard to the notice of objections filed by the opponents. The notice of objections stated several grounds of opposition, viz., smallness of merit and of utility of the invention; the Petitioners had been sufficiently remunerated, or, if not, they themselves were to blame for the insufficiency; want of novelty; extension if granted, would unduly restrain trade and would be to the public detriment; insufficiency of specification; allegations in the petition were in

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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many respects untrue. The fourth and fifth paragraphs of the notice of objections were as follows:—

"4. That the alleged invention comprised in the said letters patent was not new within this realm at the date of the said letters patent, nor was the Petitioner, the said *James Ball*, the true and first inventor within this realm of the same alleged invention, in proof whereof leave is craved to refer to the following documents published in *England* prior to the date of the said letters patent (that is to say):

"The specification to letters patent granted to *B. Blonk*, No. 1507, A. D. 1785, the provisional specification filed with the application of letters patent of *E. Brown*, A.D. 1854, No. 1048, and the provisional specification filed with the application for letters patent of *John Coldwell* and *William Coldwell*, No. 1971, A.D. 1861.

"5. That articles of analogous construction to sheep shears, and particularly tongs used in the manufacture of glass bottles, had been made within this realm by a process similar to that described in the specification to the said letters patent granted to the said *J. Ball*, and commonly used by bottle manufacturers prior to the date of the said patent. It was a matter of common knowledge in the cutlery trade prior to the date of the said letters patent that articles of cutlery and tools could be and were manufactured by working up blanks previously stamped or cut out of sheets of iron and steel."

At the hearing, with the view to shew that the manufacture by the patentee of sheep shears wholly of steel was wanting in novelty, the opponents put to the Petitioners' witnesses in cross-examination, sheep-shears constructed wholly of steel, which it was alleged had been so constructed prior to the date of the patent of *Ball*. The Petitioners objected.

Mr. *Aston*, Q.C. (Mr. *Macrory* with him), for the Petitioners:—

By the 41st section of 15 & 16 Vict. c. 83, particulars of objections must be given in an action for infringement, and the parties are bound by those particulars. The practice here must be analogous. The opponents have given in their notice instances of anticipation, and they cannot go beyond those instances, or intro-

duce evidence of which the Petitioners are not warned by the filed notice of objections.

The maxim *expressio unius est exclusio alterius* applies.

Mr. *Webster*, Q.C. (Mr. *Chadwyck Healey* with him):—

In this Court the notice of objections is filed under the 6th rule of the Orders of the Privy Council dated the 18th of November, 1835. The Act 15 & 16 Vict. c. 83, has no application in this respect to the practice of this Court. Evidence has been admitted under similar circumstances in this Court upon several occasions which are not reported: *Henry's Case; Sloper's Case.* Reference was also made to *Sugg* v. *Silber*, a case decided under sect. 41 of this Act (1). The refusal to admit evidence in a case such as this would be greatly more serious than would be the case in an action at law. Moreover the Petitioners cannot be prejudiced, because it is in the power of your Lordships to allow them every opportunity of examining into the evidence to be adduced.

Mr. *Gorst*, Q.C., Mr. *C. Bowen*, and Mr. *Mackenzie*, for the Crown.

SIR BARNES PEACOCK:—

Their Lordships are of opinion that they ought not to exclude the evidence which is proposed to be adduced. The Rules which were passed under 5 & 6 Will. 4, c. 83 (see Order of Nov. 18, 1835, rule VI.), merely require that the parties served with the petition shall lodge at the Council Office within a fortnight after such service, notice of the grounds of their objections to the granting of the prayer of the petition.

Then followed the Act of 15 & 16 Vict. c. 83, the 41st section of which enacted that the Defendant "in any action in any of Her Majesty's Superior Courts of Record at *Westminster* or in *Dublin*, for the infringement of letters patent," and "the prosecutor in any proceedings by *scire facias* to repeal letters patent," should deliver particulars of objections in the manner therein mentioned, and the same section contained a proviso to the effect "that the place or places at or in which, and in what manner the

(1) Law Rep. 2 Q. B. D. 493.

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invention is alleged to have been used or published prior to the date of the letters patent, shall be stated in such particulars."

That section contemplated a different case from the application for extension now before their Lordships and the earlier rule of the Council was unaffected by it.

Their Lordships therefore think that under the rule to which reference has already been made, it is sufficient to state the grounds of the objection without stating the particulars of those objections; and because the opponents had given as much information as they possessed to the Petitioners, and craved leave to refer to certain documents, it must not be taken that they intended to say that those documents were the only instances of anticipation upon which they would rely. Moreover, the Attorney-General would clearly have the right to introduce the evidence irrespective of the notice of objections.

Solicitors for the Petitioners: *Pitman & Lane.*
Solicitor for the Opponents: *J. H. Johnson.*
Solicitor for the Attorney-General: *Solicitor to the Treasury.*

[PRIVY COUNCIL.]

J. C.* 1879 Jan. 29, 30.

In re HUGHES' PATENT.

Patent—Non-user of Invention—Presumption of Inutility rebutted—Public Policy—Condition of Prolongation.

In all cases where the utility of a patent has not been tested by actual employment the question to be considered is, whether the evidence is sufficient to rebut the presumption arising from its non-use that the invention is one of no practical utility.

Application for a prolongation of the term granted after strong and unanswered evidence of utility, though the patent had not been used in *England* during the whole of the term. On grounds of public policy the condition was annexed that the Government and all contractors employed by the Government should be at liberty to use the invention.

THIS was a petition for a prolongation of the letters patent dated the 1st of February, 1865, granted for the invention of

* *Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

"improvements in the construction of armour-plated ships, forts, and other like structures."

The invention related to the construction of ships of war, turrets, cupolas, and other structures intended to be protected by armour-plating, and consisted of a method of strengthening all such structures by employing, in the manner described in the Petitioner's specification, hollow stringers or girders, made with double flanges, of the form shewn in the drawings annexed to the specification, running longitudinally, vertically, or otherwise, along or across the said structures. These stringers when used for the protection of ships are riveted to the skins and frames of the vessels, and when used for the protection of forts, turrets, cupolas, and such structures, may be attached to any convenient portion of those structures, and form the backing for the armour plates. Where very great strength is required, the spaces between the stringers and also the hollow in the stringers may be filled with wood or any composition that may be found suitable.

The circumstances under which the application for a prolongation was made are stated in the judgment of their Lordships.

Mr. *Aston*, Q.C., and Mr. *Macrory*, for the Petitioner.

Mr. *Gorst*, Q.C., and Mr. *Mackenzie*, for the Crown.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This is an application by Mr. *John Hughes* for the prolongation of a patent dated the 1st of February, 1865, for improvements in the construction of armour-plated ships, forts, and other like structures. The case comes before their Lordships under special circumstances. It appears that the invention has never been brought into actual use in this country during the term of fourteen years for which the patent was granted. It has not been adopted either by the Government of this country or by any private shipbuilders.

Mr. *Hughes*, the patentee, after having been engaged for some time as an iron master in *Wales*, came to *Millwall* in the year 1859, and became the manager of the large works known as the

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Millwall Works, belonging to Mr. *Mare*. In the course of his management of these works he was brought into communication with General *Burgoyne*, who was at that time the director of fortifications, and he was engaged with Sir *John Burgoyne* upon various matters connected with fortifications. About that time the defence of ships by means of armour-plating was attracting public attention, and the struggle commenced, which it appears is not yet over, between the increasing force and power of projectiles on the one side, and the resisting power which could be obtained by armour-plating upon the other. It appears that Mr. *Hughes*' attention was directed to that subject in his communications with Sir *John Burgoyne*, and that having his mind directed to the subject he produced the invention which is the subject of the patent. The invention is shortly described in his specification as follows:—"This invention relates to the construction of ships of war by strengthening them with hollow stringers or girders running longitudinally, vertically, or otherwise. These stringers are riveted to the skin and frames of the vessel and form the backing for the armour plates; the spaces between the stringers, and also the hollow in the stringers, may be filled with wood or any composition that may be found suitable." It is unnecessary for their Lordships to examine with the same degree of stringency which would be done in a Court of law, the validity of this patent. It seems to have been assumed in all the experiments which subsequently took place that there was a considerable amount of invention in the method which Mr. *Hughes* described. The merit of it is said to be that it gives great strength and resisting power to the sides of a ship with less weight of metal than other methods require.

The consideration which has pressed upon their Lordships' minds in this case has been that there has been no use whatever of the invention in this country. Their Lordships in exercising the jurisdiction which is vested in them of recommending or refusing to recommend the prolongation of a patent, are no doubt invested with powers in a great measure discretionary, but in exercising them they must be guided by the rules laid down in previous cases. It obviously necessary that that should be so, both for the proper administration of what is in the nature of a judicial function, and also for the guidance and security of patentees themselves. Cases have

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been before this tribunal on several occasions where the same state of things has existed as in the present, and what may be called the leading case on a similar state of facts is "*Bakewell's Patent*" (1). In the course of giving judgment in that case Lord *Chelmsford* says: "Now non-user of a patent can hardly be said to be a ground why an extension of the term should be absolutely refused, but it must always amount to a very strong presumption as to the invention not being useful; of course that presumption may be rebutted, as all other presumptions may be, by evidence of the utility of the patent, and if upon this occasion the patentee had been able to give satisfactory reasons why this patent, which was perfectly well known, had not been introduced into use, that of course would have answered the presumption, which is *primâ facie* against him, on account of the non-user of the patent." Their Lordships thought in that case that the evidence that was given did not rebut the presumption and they refused to extend the term of the patent. A few years afterwards another case came before the Committee, *Allan's Patent* (2), and there the same rule for the guidance of their Lordships in the exercise of their discretion was laid down. In that case it was held that a sufficient case had not been made out for an extension of the letters patent, and the rule is thus expressed by Lord *Romilly*, who gave the judgment: "Having all these circumstances present to their minds, their Lordships think that the rule to be laid down by the Judicial Committee in this case is, that where the utility of a patent has not been tested by actual employment for a period of fourteen years, it raises a very strong presumption against its utility which can only be rebutted by the very strongest evidence; and that, upon the present occasion, the evidence, so far from rebutting the presumption rather leads to a presumption that this was considered not to be a practical patent, however theoretical it might be found to be." The question to be considered therefore, in all these cases, is whether the evidence is sufficient to rebut the presumption arising from its non-use that the invention is one of no practical utility. A great deal of evidence has undoubtedly been given in this case. It appears that the attention of the Government was very early called to the invention, and that in the year 1868 trials were made of a shield

(1) 15 Moore's P. C. (O.S.) 385. (2) 4 Moore's P. C. (N.S.) 443.

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prepared upon the principle of Mr. *Hughes'* patent, which was called the *Millwall* shield, and which was tried and tested in competition with various other shields, and amongst others one called the *Gibraltar* shield. The *Gibraltar* shield appeared to be the one which came next in order of merit to that of the *Millwall* shield, and the result of that trial was to shew a great superiority in the *Millwall* shield over the *Gibraltar* shield, and reports were made by the officers who superintended those operations which were altogether in favour of the superiority of the *Millwall* shield. Witnesses of the highest authority have been called on the part of the Petitioner, and their Lordships cannot fail to give great weight to the opinions of officers so distinguished as Sir *Spencer Robinson*, Sir *Henry Lefroy*, and Sir *John St. George;* all these witnesses have expressed their opinion of the value and merit of the invention, an opinion which they formed at the time of the experiments to which allusion has just been made, and which, with all the experience they have since acquired, they still entertain. Other witnesses have been called who have given similar evidence. If the case had stood there, notwithstanding the great weight which it must be conceded attaches to the evidence of those gentlemen, their Lordships would still have felt considerable doubt whether the utility of the invention had been sufficiently established; because, from the fact that the invention has not been adopted by the Government, it may be inferred that other officers, of probably the same amount of experience, who have had the responsibility thrown upon them of constructing ships in the manner best suited for the public service, are presumably of a different opinion; but the balance has been turned in the minds of their Lordships in favour of the patentee upon the point of the utility of the invention, a utility sufficiently great to rebut the presumption that would arise from its non-use, by the statements made by Her Majesty's Attorney-General through Mr. *Gorst.* It is impossible not to suppose that the attention of the Admiralty has been called to the present inquiry. The Crown, or the Admiralty acting on the part of the Crown, might have opposed the prolongation, but Mr. *Gorst* has informed us that he has not been instructed to oppose this prolongation; and, further, he has intimated the opinion, which is probably formed not merely from his own view

of the evidence, but from the view of those who instruct him, that upon the evidence this is a valuable invention. If it be valuable it can only be so because, though not yet adopted, it is an invention which at last may be brought into use. The presumption, also, of want of utility is further rebutted, if it be true, as many of the witnesses have stated, and there is no contradiction of it, that a greater necessity than formerly existed arises from the present state of the contest between guns on the one side and armour on the other; for some such method of defending ships by armour as that pointed out by Mr. *Hughes*, which it is said provides armour with less weight of metal, in proportion to its power of resistance, than any other system. If that is so, it may account for the other modes having been used up to the time when guns had not been made of so great a size, and when the projectiles thrown from them had not the force of those which have now been introduced, and therefore it may be that those methods which have hitherto been in use may become inefficient, and this principle may ultimately be adopted. It is sufficient to say, upon this point, that the evidence of utility is very strong and unanswered, and is supported rather than controverted by the statement which has been made on the part of the Attorney-General.

There are two cases which are not very dissimilar in their circumstances from the present, where prolongations were recommended by this tribunal. One is *Berrington's Case*, which is referred to in the judgment in *Allan's Patent* (1). *Berrington's* patent was for improved knapsacks. It was the Government only which was likely to have used the knapsacks, and the Government had not adopted them during the period of the term of the patent. Their Lordships, however, were satisfied that the invention was a useful one and that the Government might possibly adopt it, and they extended the patent. The other case was *Ruthven's* patent for water propellers. There also, though there had been no use of the invention during the term of the patent, their Lordships granted a prolongation, and they relied very much upon the course taken by the counsel representing the Crown. Lord Justice *Knight Bruce*, in giving judgment, said: "They cannot disregard the manner in which the Admiralty and those who represent the will of the Crown, or the inclination

(1) 4 Moore's P. C. (N.S.) 443.

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of the Crown in cases of this nature, view the matter; and they cannot regard that opinion as unfavourable to the claim of the Petitioner." Their Lordships certainly do not regard what was said on the part of the Attorney-General in this case as unfavourable to the claim of the Petitioner.

The only other point upon which comment need be made is the condition, if any, upon which this patent should be prolonged. On both sides this consideration has been treated as involving a question of public policy, as undoubtedly it does. Their Lordships think, on the whole, that Mr. *Hughes* made sufficient efforts in this country to bring the invention to the notice of the Government, and, to a certain extent, to the notice of shipbuilders generally; but, failing to get his invention taken up in this country, he appears to have succeeded in getting it taken up by the Governments of *Belgium* and *Russia;* and in *Russia,* according to his own account, it has been used to a considerable extent. Mr. *Hughes* has stated that all the armoured ships which have been built in *Russia* since 1868 or 1869 have been constructed upon his plan, and a part of the fortifications of *Cronstadt* have been also so constructed. Failing to introduce his invention into practical use in this country, Mr. *Hughes,* who had a right, if he so chose, to go to foreign countries and introduce it, succeeded in getting it adopted abroad; but having done so, having exercised that which was his right, their Lordships think that on grounds of public policy the Government of his own country ought not to be put, with regard to the use of this patent, in a worse position than foreign Governments; and they also think that contractors employed by the Government should also be free to use this patent; otherwise this consequence would follow, that inasmuch as a great part, or some considerable part, of the navy of this country is now built in private yards, there might be considerable hindrance to the Government in getting ships so built if private builders were to be subject to such royalties as the patentee might choose to impose under this patent.

Their Lordships therefore think that whilst, on the whole, but with some hesitation, they think it right to advise Her Majesty to prolong this patent, it must be upon a similar condition to that inserted in the prolongation granted to Sir *William Palliser,* which

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was expressed in these terms: "Upon condition that the officers of Her Majesty's Government, and all persons who may from time to time contract for the supply of ordnance and projectiles for Her Majesty's service, in respect of work done in the execution of such contracts shall be at liberty to use the same invention or inventions during the continuance of the new letters patent." That is the language used in *Palliser's* patent. The language will, of course, be changed so as to adapt it to this case.

On this condition their Lordships will humbly recommend Her Majesty to prolong this patent for the term of seven years.

Solicitors for the Petitioners: *Thomas Clark & Son.*
Solicitors to the Treasury for the Crown.

[HOUSE OF LORDS.]

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EDMUND COWELL MULKERN AND J. RUNTZ . . . . . } . . APPELLANTS;

AND

JAMES LORD . . . . . RESPONDENT.

Benefit Building Society Rules—Arbitration—Building Societies Act, 1874.

23 C.L.D. 106-7
108, 160, 4-2

Friendly societies and benefit building societies do not stand on the same footing.

The provisions of the *Friendly Societies Act* (10 Geo. 4, c. 56) as to the framing, &c., of rules are, by sect. 4 of the 6 & 7 Will. 4, c. 32, made applicable to benefit building societies established under that Act.

A benefit building society made certain rules, one of which was, that in case of any dispute arising between the society and any member thereof, reference shall be made to arbitration, pursuant to the 10 Geo. 4, c. 56. *L.* became a member of the society and executed certain mortgages to the persons who acted as its trustees. In these mortgages he covenanted, among other things, to observe the rules of the society. *L.* did not keep up the payments secured by the mortgages, and the trustees took possession of some of the mortgaged premises, and sold them. *L.* brought an action praying for accounts, and an injunction to prevent future sales, &c. The trustees insisted that he was, by the rules, precluded from any right of action, and must proceed by arbitration under these rules:—

Held, that the rules did not preclude him from a right of action, for that proceedings in respect of accounts under a mortgage and sale of the property, which might include title to redemption or a judgment of foreclosure, were not such disputes, between the society and a member, as the statutes had contemplated.

Per LORD O'HAGAN:—The *onus* of shewing that a complaining party has lost the ordinary right to maintain an action lies on him who denies such right.

APPEAL from an order of the Court of Appeal dated the 6th of February, 1878, which had discharged a previous order of the Master of the Rolls, dated the 14th of December, 1877. The Appellants were the trustees of the *Birkbeck Permanent Benefit Building Society*, and the Respondent was a holder of shares in that society, and was also a mortgagor of property to its trustees.

The rules of the society were duly registered under the *Benefit Building Society Acts*, in August, 1859, but the society had not been incorporated under the *Building Societies Act*, 1874 (see s. 7).

In January, 1869, *Lord* became a member of the society, having subscribed for 242 shares of £50 each, and the directors, upon his application, advanced to him a sum of £12,100, for a period of twelve years, as from the 12th of January, 1869, to be repaid by monthly instalments of £94 each. To secure the repayment, a mortgage was executed by *Lord*. By this mortgage, dated on the 7th of January, 1869, certain freehold hereditaments were granted by *Lord* to the trustees, their successors, &c. (subject to certain existing indentures of lease), to secure to the society payment of all subscriptions, fees, fines, and other moneys, *Lord* binding himself to observe and perform all the rules and regulations of the said society, according to the tenor and effect thereof; and, in case of default, there was a power to the mortgagees to sell the mortgaged premises.

Lord soon afterwards subscribed for eighty additional shares in the society, and obtained, in like manner as before, an advance of £4000 for a period of five years from the 5th of March, 1872, to be repaid by monthly instalments of £89 8*s*. Another mortgage of a similar kind was executed in respect of this loan. The second mortgage was dated on the 16th of March, 1872, and all the premises were farther charged with payment to the trustees of "the additional sum of £4000 and interest, subscriptions, fees, fines, and other moneys payable by the mortgagor, his executors, &c., in respect of the additional eighty shares, as also of the subscriptions, fees, fines, and other moneys" thereafter to become payable in respect of the thereinbefore mentioned 242 shares.

No payments were made by *Lord* under these mortgages, and the trustees, in exercise of the powers under the first mortgage, sold part of the mortgaged premises. The 91st rule of the society enabled *Lord* to adopt measures to redeem the mortgaged premises, but he did not act under those rules, but in August, 1877, commenced an action in the Court of Chancery, and prayed for accounts and for an injunction to restrain the trustees from selling other parts of the property, and for general relief. On motion made in the action, in December, 1877, the trustees appeared, and submitted that under the rules 109, 110, and 111 of the society, *Lord* was precluded from bringing an action against the trustees, and was bound to submit all matters in dispute

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between them to arbitration (1). The Master of the Rolls adopted this view of the matter, and on the 14th of December, 1877, made an Order accordingly. The Court of Appeal, on the 6th of February, 1878, discharged this Order (2). *Lord* contended that the rules of the society had no power to prevent him from resorting to an action, but if the other opinion should prevail, he then insisted that the rules of the society had not been observed in the appointment of arbitrators, and that there not being five arbitrators duly appointed according to those rules, they could not be enforced against him.

It was alleged, with reference to this last matter, that before the motion came on for hearing two of the arbitrators originally appointed by the society had died, and no arbitrators to supply their places had been appointed at the next meeting of the society or of the general committee, within the words of the statute, but that two successors were appointed at a "special finance meeting," and "a board meeting" of the society; but it did not appear that notice of appointing them had been given. Of these new appointees one died, and no one was appointed to succeed him, either at a general meeting of the society, or by the general committee.

(1) The 109th Rule was in these words: "That in case of any dispute arising between the society and any member thereof, or the legal representatives of any member, reference shall be made to arbitration, pursuant to the 10 Geo. 4, c. 56, s. 27, unless such dispute can be amicably arranged by the board of directors and the member, or the legal representatives of such member, within fourteen days from the time such dispute shall be formally brought before the board."

The 10 Geo. 4, c. 56, s. 27 (which is thus referred to in the rule), provides, that rules shall be made (to be confirmed as required by that Act) specifying whether a reference of any matter in dispute between the society and any person acting under it, and any individual member thereof, or person claiming on account of any member, shall be made to justices of the peace of the county, or to arbitrators appointed as thereinafter directed. If to the latter, the arbitrators were to be elected at the first meeting of the society, "or general committee thereof," held after the enrolment of the rules, and in case of the death, or refusal to act, of any arbitrator or arbitrators, the society or the general committee thereof was authorized, at the next meeting, to elect one or more arbitrators, as the case might be, in the place of the others, and whatever award was made by the arbitrators was to be binding on all the parties, and was to be final, and was not to be removed into any Court of law, or to be restrained, but might be enforced by any two justices of the peace.

(2) See *Weekly Notes*, 1878, p. 25.

26 L.R. 319

This objection as to the arbitrators was not discussed in the Court of Appeal, nor the evidence thereon entered on the Order of that Court. The Appellants, in their papers presented to the House, alleged that the meetings described by the Respondent as "a special finance meeting" and "a board meeting," were in fact "the ordinary periodical meetings of the whole of the general committee," and that at the date of the Order of the Master of the Rolls there did exist five duly appointed arbitrators under the rules of the society and the provisions of the *Common Law Procedure Act*, 1854.

The Solicitor-General (Sir *H. S. Giffard*), and Mr. *Waller*, Q.C. (Mr. *W. S. Owen* was with them) for the Appellant:—

The general rule that agreements between private parties cannot oust the jurisdiction of the Courts is admitted, but the Legislature has, for public purposes, established some exceptions to it, and this case furnishes an instance.

Taking the rules of the society and the provisions of the statutes regulating benefit building societies together, it is clear that this action cannot be maintained. The rules of the society distinctly provided for arbitration in accordance with the 10 Geo. 4, c. 56, s. 27. The general provision of the statute in that section took away from a member of a benefit building society the right to bring an action against the society in respect of any dispute between himself and that body. The object of the law (especially with relation to such societies) must be to prevent needless and possibly vexatious litigation: *Armitage* v. *Walker* (1) recognised in *Callaghan* v. *Dolwin* (2). The 7 Will. 4, c. 32, s. 4, adopted in that respect the provisions of the previous statute. That had been declared to be the policy of the law: *Thompson* v. *The Planet Benefit Building Society* (3). And the 9 & 10 Vict. c. 95, s. 77, following out the principle of the former statutes, favoured the scheme of arbitration, even as to the exclusion of actions in County Courts.

The 13 & 14 Vict. c. 115, s. 22, the *Friendly Societies Act*, s. 22, contained similar provisions as to arbitration. It might therefore

(1) 2 K. & J. 211. (2) Law Rep. 4 C. P. 288.
(3) Law Rep. 15 Eq. 333.

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be assumed that the Legislature had deliberately intended that in the case of such societies litigation should be discouraged. In *Ex parte Payne* (1) Mr. Justice *Erle* adopted this view of the law, saying that the object had been "to provide a cheap, simple, and speedy decision," and to oust the jurisdiction of the ordinary tribunals, and he referred to *Crisp* v. *Bunbury* (2), and as to *Cutbill* v. *Kingdom* (3), which appeared to be the other way, he pointed out that the action was there held to be maintainable because the rules of the society in that case did not comprise the matter of that particular action. The case that has been relied on as against the Appellants is that of *Morrison* v. *Glover* (4). But in reality that case is like *Cutbill* v. *Kingdom*, one in which though the Defendant was a member of the society, one part of the claim on which the action was brought against him consisted of something that was not, and, indeed, could not be, included within the rules of the society, for in truth it related to a covenant for a payment to a third person. It was not therefore a matter which could be in dispute between a society and the member as member, and consequently it might be the subject of an action. It was on that point, and not on the point of the society being a mortgagee and the Defendant, a member of the society, being mortgagor, that the case was decided. The case of *Fleming* v. *Self* (5) did not apply, for there the Plaintiff's claim was made in respect of matters which the Lord Chancellor in his judgment distinctly declared were matters not in dispute between the society and a member as such, and could not be made the subject of decision by the arbitrators appointed under the society's rules.

In *Willesford* v. *Watson* (6), which came before Vice-Chancellor *Wickens*, whose order was affirmed on appeal, the matter in dispute was declared to be within the very words of the agreement, and therefore the order to refer was affirmed, and the objection that the arbitrators had not the same powers as those which could be exercised by a Court was met with the observation that that had probably been a matter of consideration when the agreement was entered into, and that reasonable men might have agreed to

(1) 5 Dowl. & L. 679.
(2) 8 Bing. 394.
(3) 1 Ex. 494.
(4) 4 Ex. 430.
(5) 1 Kay, 521; 3 D. M. & G. 997.
(6) Law Rep. 8 Ch. Ap. 473.

incur that possible inconvenience for the very purpose of avoiding litigation.

The case of *Crisp* v. *Bunbury* (1) proceeded on the principle that these benefit societies were to be saved from the dangers of litigation, and shewed that since the 9 Geo. 4, c. 92, no action against the trustees of a savings bank society would be permitted, that all claims and disputes must be settled by arbitration according to the rules of the society itself. The subject was there fully considered, and Lord Chief Justice *Tindal* (2) observed that even where the words of the section were not in themselves mandatory, but appeared to be only permissive, the declared object of the statute required that they should have a mandatory effect. That case related to the trustees of the *Mildenhall Savings Bank*, as to which on a former occasion the Court of Queen's Bench had issued a mandamus to compel the trustees to appoint an arbitrator and go into arbitration: *Rex* v. *Trustees Mildenhall Savings Bank* (3).

In *Reeves and the Trustees of the Southwark Benefit Building Society* v. *White* (4) it was declared that the rule was imperative, and that the jurisdiction of the Courts had been ousted by the statutes, the principle asserted in *Ex parte Payne* (5) and *Crisp* v. *Bunbury* (1) being expressly adopted. *Morrison* v. *Glover* (6) was there distinguished on the ground that in that case one of the subjects of the action was plainly not affected by the words of the statute, but related to a matter which could not be described as a dispute between the society and a member. In *Wright* v. *The Monarch Investment Society* (7), which was the case of a building society incorporated under the *Building Societies Act* of 1874, the Plaintiff sought an account of what he claimed to be due to him in respect of an overcharge of the society against him on his mortgage, which he had been obliged to pay, under protest, in order that he might obtain possession of his deeds to hand them over to a vendor of his property. The society applied under the Common *Law Procedure Act* of 1854, and the *Building Societies Act*, 1874,

(1) 8 Bing. 394.
(2) Ibid. at p. 399, 400.
(3) 6 Ad. & E. 952.
(4) 17 Q. B. 995.
(5) 5 D. & L. 679.
(6) 4 Ex. 430.
(7) 5 Ch. D. 726.

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to stay proceedings in his action, and the Master of the Rolls granted the application, holding that the jurisdiction of the Courts was ousted.

Mr. *Davey*, Q.C., and Mr. *F. W. Bush*, for the Respondent :—

The statement of the claim here shews in a very distinct manner that this is not a dispute between the society and a member, as member, in which case probably some of the cases cited on the other side might be applicable, but is a dispute between the society as mortgagee, and the present Respondent as mortgagor, which might exist between them though he was not a member of the society, and quite independently of any membership. The cases therefore which shew that disputes of that kind do not come within the provisions for compulsory arbitration apply here. And the first thing that would strike the mind would be this, that if an arbitration under the rules of the society took place, there would be no means, in a case of this kind, by which the decision on that arbitration could be, by either side, worked out. The Legislature never could have intended to compel the parties to enter into an arbitration which must prove in the end ineffectual and abortive. *Morrison* v. *Glover* (1) was a case of this kind. There one of the covenants of the mortgagor was to pay certain rents to Lord *Cadogan*, and that being, as it was here, a matter which was entirely unconnected with the character of a member of the society, the action was held maintainable. The statement of the claim here shewed that the matter in dispute was a matter as between a mortgagor and mortgagee alone, and not at all as between a society and one of its members. That case in another form came before the Court of Queen's Bench in *Doe* d. *Morrison* v. *Glover* (2), and the society was allowed, in the name of *John Doe*, to maintain ejectment for the premises that had been mortgaged. It was clear, therefore, that unless the subject in dispute was strictly one between society and member, a proceeding by action might be maintained.

And in *Farmer, Trustee of a Building Society* v. *Giles* (3), where money had been advanced to a person who was a member of the Society, and who had entered into a covenant to pay, he was, upon

(1) 4 Ex. 430. (2) 15 Q. B. 103. (3) 5 H & N. 753.

action brought, held not to be bound by the arbitration clause in the articles of the society, for that the transaction was one not between him as a member and the society, but between him as the mortgagor, and the society as the mortgagee of property. The reason for the distinction was clear. The arbitrators in such a case were deficient in authority. No arbitrator appointed under the rules of the society could order the foreclosure of a mortgage. In *Reg.* v. *Trafford* (1) there was a motion to set aside an order of justices on the ground of want of authority to make it, in a case where the dispute was between a society and a retiring member who had mortgaged his property to it; and it was held that the order was bad for want of jurisdiction. In *Prentice* v. *London* (2) it was laid down that to bring a dispute within the arbitration clause it must be clearly one which arose between the trustees and the party claiming as a member of the society. It was not so here. In the judgments in that case *Morrison* v. *Glover* (3) was expressly referred to and recognised.

Crisp v. *Bunbury* (4) really did not apply to this case, for there the relation between the parties arose directly from the society, and could exist on no other ground. So in *Reeves* v. *White* (5) and in the other cases cited for the Appellant.

The principle of law that parties cannot by agreement among themselves oust the jurisdiction of the Courts was expressly affirmed in *Scott* v. *Avery* (6), and here the words of the statutes do not assist them to do so, for there is nothing in the facts of this case to make it an exception to that rule, nor to give a pretence for saying that it is one in which the Legislature intended to exclude the ordinary jurisdiction of the Courts. Here, too, there had not been a proper appointment of arbitrators.

The *Solicitor-General* replied.

THE LORD CHANCELLOR (Earl *Cairns*):—

My Lords, the Appellants in this case are trustees of the *Birkbeck Building Society*; the Respondent is a member of the society

(1) 4 El. & Bl. 122.
(2) Law Rep. 10 C. P. 679.
(3) 4 Ex. 430.
(4) 8 Bing. 394.
(5) 17 Q. B. 995.
(6) 5 H. L. C. 811.

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who has mortgaged property to it to secure a loan of £14,000. He now seeks to redeem that mortgage, and to have an account against the Appellants of the moneys received by them on sales of part of the mortgaged estate, and of sums which but for their default they might have received while in possession of the estate, they having been mortgagees in possession. A decree for account and redemption, under the circumstances, would be a matter of course, if the Respondent is not in some way precluded from asking for it. The Appellants contend that he is so precluded, and that his only remedy is arbitration.

There is not, I think, any doubt that by the rules of this society, standing alone, the Respondent would not be prevented maintaining a suit for redemption. The 91st rule it is true states the terms upon which a member is to be entitled to redeem his property before the expiration of the full term for which it was mortgaged; and the 109th and two following rules provide that if any dispute arises between the society and any member, reference shall be made to arbitration. But it is clear that a mere contract of this kind between the parties, unless made obligatory by some Act of Parliament, would not of itself have the effect of ousting the ordinary jurisdiction of the Courts.

The Appellants, however, insist that arbitration has been made obligatory by Act of Parliament; and the Act of Parliament which they refer to for this purpose is the 10 Geo. 4, c. 56. That is the statute consolidating the law as to friendly societies, societies established for the mutual relief and maintenance of the members in sickness, old age and infirmity, but not in any way contemplating transactions by way of mortgage between the society and its members, much less mortgage transactions of the magnitude of the one now in question. Various provisions were made by that statute for the economical and expeditious management of the petty transactions of such societies, and among the rest, the 27th section enacted that provision should be made in the rules of each society, specifying whether a reference of every matter in dispute between the society and a member, should be made to justices of the peace or to arbitrators. If to arbitrators, the award, assumed to be an award for the payment of money, was to be enforced by a warrant of two justices, and if the

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reference was to be made to two justices in the first instance, they were themselves to enforce their order, which was to be final.

It is unnecessary to decide the question, but I will assume in favour of the Appellants that in the case of societies regulated by this statute the clause to which I have referred would prevent a member suing the society or its trustees, and would oblige him to submit any dispute which he had, as a member, with the trustees to such an arbitration as is mentioned in the Act.

But how does this statute affect the society of the Appellants, which is not a friendly society, but a building society established under 6 & 7 Will. 4, c. 32? The argument of the Appellants is this—They say that the 4th section of that statute enacts that all the provisions of the *Friendly Societies Act*, 10 Geo. 4, c. 56, so far as the same or any part thereof may be applicable to the purpose of any benefit building society, shall extend to the benefit building society and the rules thereof, in the same manner as if such provisions had been expressly re-enacted.

Now, I will assume that the mortgage transaction between the Respondent and the Appellants was one warranted by the constitution of the Appellants' society. It is a mortgage of an ordinary kind conveying the legal estate, and constituting the relation of mortgagor and mortgagee, that is, a relationship the consequences of which are well known to the law. That relation creates on the part of the mortgagee a right, in certain events, to enter into possession of the mortgaged property, subject to a liability to account for receipts, and for wilful default; a farther right to exercise a power of sale, if a power of sale is given, and a right to obtain that which a Court alone can give, a decree of foreclosure in the event of non-payment of the mortgaged debt. It creates in the mortgagor a right to obtain from the mortgagee an account on the footing I have mentioned, and a right to obtain, what a Court alone can give, a decree for the redemption and re-conveyance of the property—a decree which, in default of redemption, dismisses the suit, and thus operates as a decree of foreclosure.

This being the relative position, and these the rights of the mortgagor and mortgagee, it appears to me to be impossible that these rights, and especially the rights of foreclosure and redemption, could be enforced or adjusted by such a reference to

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arbitration as is provided by 10 Geo. 4, c. 56, s. 27; and I therefore arrive at the conclusion that the provisions of that Act are not applicable to those purposes of a benefit building society which involve the adjustment of rights created by mortgage.

It is unnecessary in the view which I take of the case to refer to many of the authorities which were cited during the argument, but I may say that the view taken by Lord *Cranworth* in *Fleming* v. *Self* (1) appears to me in substance to coincide with what I have endeavoured to express. I think the decision of the Court of Appeal in this case is right, and that the appeal should be dismissed with costs.

LORD HATHERLEY :—

My Lords, I am of the same opinion. Some authorities were cited which seemed at the first blush opposed to each other, and to be decided by Judges of considerable authority both one way and the other. The application to building societies at all of the powers of arbitration arose in this way; building societies had many objects in common with friendly societies, and many objects in common with savings banks, and consequently this was another instance in which the application of the rule of arbitrations, superseding the jurisdiction of the ordinary Courts of Justice, was introduced.

On looking into the *Friendly Societies Act* it was clear that not only was there a choice given between arbitrators on the one hand and magistrates on the other, but there was a set form of conviction in each case laid down; and two things had to be determined, whether *A.* should pay to *B.*, or rather to the trustees, a certain sum of money—a definite sum, that being the matter in dispute which was to be settled by the speedy mode of arbitration—and, whether *A.*, continued to be a member of the society, or was not a member of the society, shewing again the nature of the dispute, namely, whether a member had or had not misconducted himself so as to be deserving of expulsion for having broken the rules of the society. When you come to look into the authorities which were cited, they amount to this, that where the case went beyond the internal arrangements of the society, and introduced

(1) 3 De G. M. & G. 1030.

something which might be within their functions in the ordinary course of their business, but yet still outside the whole scheme and scope of the society itself, then a person who had a much larger interest than any of those contemplated among the ordinary members, could not be deprived of recourse to the ordinary tribunals of the land. And more especially he could not be so deprived in regard to mortgages, where, as in this case, possession was taken, where there was a question as to an account against the mortgagees for wilful default, and where there was an account also for outlay and expenditure on the mortgaged premises by the mortgagees, and where certain other questions had arisen which cannot be properly sifted unless you go to the proper Court which has all the means and the powers of sifting and dealing with them. I think, therefore, my Lords, when you see what the real nature of the case is, there cannot be a doubt that this tribunal fell short of the requirements of the case, and that the party who sought to have a decree for account and redemption, was entitled to it.

LORD O'HAGAN:—

My Lords, the substantial question in this case appears to me to have been settled by a series of decisions of very high authority: and unless your Lordships are prepared to overrule them, I think that the Respondent is entitled to succeed. For my part, I see no reason to doubt the correctness of the principles on which they have been founded.

On the undisputed facts before us, it is plain that the Respondent is entitled to maintain his action unless the Appellants can establish that he has been expressly forbidden by law to bring it. The onus is on them. He is a mortgagor, and has received large advances on account of his mortgage. The Appellants are mortgagees. The Respondent failed to make the payments which he ought to have made according to his contract, and the Appellants have exercised a power of sale given to them in the usual way, and have sold a portion of the mortgaged premises in discharge of the debt due to their society. A large sum admittedly remains unpaid, and only a part of the premises has been disposed of.

In these circumstances, the Respondent brings his action and files his claim, demanding an account of the money still due by

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him, an account of the money which the Appellants have received, or without wilful default might have received, and an injunction to restrain them from disposing of the premises still remaining unsold. This is a very ordinary claim, and would be conceded as a matter of course but for the contention of the Appellants that the Respondent is a member of their society, and, as such, is obliged by its rules to submit any disputes between the society and himself to arbitration, pursuant to 10 Geo. 4, c. 56, s. 27.

As I have said, the burden of this contention is on the Appellants, and the Respondent has a right to sustain his action unless that right is taken from him by clear and express legislation. The privilege of appeal to a Court of Justice remains with him, unless its jurisdiction is statutably superseded.

The Appellants rely, *inter alia*, on the 109th rule of their society, which is in these words:—[His Lordship read the rule, see *ante*, p. 184.] And they contend that this rule, which *per se* would be wholly insufficient to take from the Respondent his right of action, is made effective for that purpose by the statute to which it refers.

That Act was passed "to consolidate and amend the laws relating to friendly societies." It contained provisions for the cheap and easy settlement of disputes between their members, in reference to matters within the scope of their operations; and, if we were dealing with such a dispute as to such a matter, the rule in question, if properly framed according to the statute, would be of binding force. But the society which the Appellants represent is a building society, and the provisions of the *Friendly Societies' Act* are only made to affect it by 6 & 7 Will. 4, c. 32, which was passed "for the regulation of benefit building societies," and by its 4th section enacts that those provisions, "so far as the same or any part thereof may be applicable to the purposes of any benefit building society," shall extend and apply to such society in such and the same manner as if those provisions had been therein expressly re-enacted.

The real question is, whether the provisions are here applicable? And I am clearly of opinion that they are not, and should not be so applied. It seems to me necessary merely to state the nature of the transaction as to which the Appellants ask your Lordships

to compel the application of the legal machinery of the *Friendly Societies Act*, and the character and operation of that machinery, to demonstrate the utter inapplicability of the latter to the former.

The building society which the Appellants represent appears to have large monetary dealings. The advance to the Respondent was originally £12,000, and £4000 were afterwards added to it. The powers given to the mortgagees were used on the default of the mortgagor, and the taking of the accounts, which he is entitled to demand, may involve long and laborious calculations, the difficult application of legal principles, and the authoritative interference of a tribunal competent to adjust the complicated relations of the parties, and carry into effect their relative rights. The claim of the Respondent may raise nice questions—*e.g.*, as to wilful default, of which only lawyers can be qualified to dispose,—and invokes the exercise of powers by injunction, or otherwise, which belong exclusively to a Court of Justice.

This being the nature of the transaction, what is the machinery which the Appellants seek to apply to it? That which manifestly was intended to deal with small affairs amongst humble people, and with simple controversies easily brought to a short and final issue. It aimed to secure mutual assistance to the working classes, in circumstances of difficulty, and to settle their ordinary disputes and enforce their limited demands, at the least expense and in the promptest way. It contemplated the daily dealing of the members one with another, and was in no way adapted to the arrangement of considerable claims and the solution of doubtful questions.

And accordingly, the matters in dispute with which the statute intends to meddle are to be referred, according to circumstances, to an arbitrator or a justice of the peace; the arbitrator to be chosen by the society, and the justice to act in cases submitted to him by its rules. But the exercise of the jurisdiction of either, can only result in the levy of a sum of money to be raised by distress, and how small, even so, must be the amounts meant to be dealt with is shewn by the trifling fee allowed to the arbitrator upon a reference, the few shillings of costs given on a proceeding before the justice, and the absolute finality of the award or the judgment which may be pronounced. There can be no appeal from either; and they are not removable into a Court of Law or restrainable by a Court of Equity.

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Such provisions can plainly have been designed only to regulate disputes of a trifling and domestic kind; and it seems to me idle to suppose that an account of the sums due upon the Respondent's mortgage, or of the sums received by the Appellants or lost by their wilful default, could possibly be taken by an arbitrator clothed with no special powers, or by an ordinary justice of the peace; whilst the redemption, which the Respondent seeks, they must be absolutely without power to secure to him. I should have been of opinion, if we had no guidance from authority, that, for these reasons, the provisions of the *Friendly Societies Act* cannot be applicable, and ought not to be applied in the circumstances before us. But, as I have said, that view is maintained by many decisions. *Morrison* v. *Glover* (1) sustains it, and is undistinguishable from the present case. *Cutbill* v. *Kingdom* (2) and *Reg.* v. *Trafford* (3) are to the same effect; and in *Fleming* v. *Self* (4), to which the Lord Chancellor has referred, Lord *Cranworth* states succinctly the principle adopted in these and other cases:—"The total absence of adequate machinery for enabling arbitrators to enforce any award they might make on the mortgage, in a case like the present, affords cogent evidence that the dispute is not within their competency." And surely the evidence is as cogent with reference to a justice of the peace, if any one should claim for such a functionary the power of interference.

In the view I take of the matter, it is unnecessary to discuss the question raised at the Bar as to the validity of the appointment of the arbitrators. As to the *Common Law Procedure Act*, I agree with the Court of Appeal, that there being no statutable agreement to refer, no jurisdiction is created under that statute.

I am satisfied, on principle and on authority, that the Appellants have failed in their contention, and that the judgment should be affirmed, with costs.

Decree appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 7th April, 1879.

Solicitor for Appellants: *J. P. Poncione.*
Solicitor for Respondent: *J. H. Kays.*

(1) 4 Ex. 430.
(2) 1 Ex. 494.
(3) 4 El. & Bl. 122.
(4) 3 De G. M. & G. 1030.

[HOUSE OF LORDS.]

PRYCE AND OTHERS . . . . . APPELLANTS;

AND

THE DIRECTORS, &c., OF THE MONMOUTHSHIRE CANAL AND RAILWAY COMPANIES . . . . . RESPONDENTS.

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1878
Nov. 5, 6.
1879
April 7.

Railway—Toll—"Per Ton per Mile"—Construction of Acts imposing Tolls—Costs where Judges divided in Opinion.

A company obtained an Act (8 & 9 Vict. c. clxix), authorizing it to construct a railway and to demand tolls for the conveyance of passengers and goods thereon. The charge for the conveyance of goods was generally thus expressed, "per ton per mile not exceeding," &c. One clause provided that "for articles or persons conveyed on the railway for a less distance than four miles" there might be, "in addition to the prescribed tolls for conveyance, a reasonable charge for the expense of stopping, loading, and unloading." No publication of this charge in the form of "a toll" had been made upon the toll board:—

Held, that this "charge" for stopping was not properly a "toll," and that the non-publication of it on the toll-board in the form required by the *Railways Clauses Consolidation Act*, 1845, ss. 93 and 95, did not prevent the company from demanding it. The judgment of the Court below was on this point affirmed.

The 105th clause granted tolls for "a fraction of a mile beyond four miles," &c.; the company claimed such tolls when the whole distance traversed was less than four miles. The Court of Appeal, consisting of Lords Justices *James*, *Mellish*, and *Baggallay*, had been divided in opinion on this point; Lords Justices *James* and *Baggallay* holding that on the true construction of the words in the clauses of the Act such a charge was justifiable, Lord Justice *Mellish* holding that it could not be made. On appeal to this House there was again a division of opinion.

THE LORD CHANCELLOR (Earl *Cairns*) and LORD SELBORNE were of opinion that the charge was, on the whole, warranted by the words of the Act, and that the judgment of the Court below must on this point also be affirmed.

LORD PENZANCE and LORD O'HAGAN, applying the principle that no charge could be imposed on the public but by the clearly expressed intention of the Legislature, *held* that in this case the Legislature had not clearly expressed an intention, nor had intended, to authorize such a charge.

The judgment of the Court below stood affirmed. No costs were given.

Reasons for not giving costs in such a case, as suggested in *Anderson* v. *Morice* (1) explained.

THE present Respondents are the owners of the canal and railway, the Appellants were persons carrying on business along the line,

(1) 1 App. Cas, 713, at p. 750.

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and were freighters upon it. The Respondents brought several actions to recover tolls for the conveyance of goods along their railway. By an Act of 1792 (the original Canal Act of this company), when "any boat, waggon, or other carriage should pass by any post, &c., regulating the length of half a mile, the tolls shall be paid for a full-half mile, although it should not actually have passed the full half-mile, and that in all cases where the weight of the lading in any boat, &c., should not make up an even quarter of a ton, the tolls payable for a full quarter of a ton shall be paid." A similar provision was made in an Act of 1802, which directed that "where any goods were conveyed from any distance short of a quarter of a mile, either from the place of setting out, or over and above an entire quarter or any number of entire quarters of a mile, the rates for a full quarter of a mile shall be paid for every such less distance;" and posts were directed to be put up denoting the distances.

In 1845 the Plaintiffs obtained an Act (8 & 9 Vict. c. clxix) authorizing them to make a railway from *Newport* to *Pontypool*, and the construction of the clauses of that Act formed the subject of discussion in this case. Sect. 104 was (so far as is material here) in these words: "It shall be lawful for the company to demand any tolls for the use of the railway, not exceeding the following (that is to say), in respect of the tonnage of articles conveyed upon the railway, or any parts thereof, as follows: For all sorts of manure, and all undressed materials for the repair of highways, and for all coals, culm, coke, ironstone, and iron ore, per ton per mile, not exceeding three farthings, until the expiration of five years after the passing of this Act, and afterwards per ton per mile not exceeding one halfpenny; and if conveyed in carriages belonging to the company, whether before or after the expiration of the said five years, an additional sum per ton per mile not exceeding one eighth of a penny." The next sub-section mentioned other things, the toll for which was to be "per ton per mile not exceeding one penny;" if carried in carriages of the company an additional sum per ton per mile not exceeding one-eighth of a penny." The third sub-section was: "For all iron, lead, tin, and tin plates (except nails, utensils, or other articles of merchandise) per ton per mile not exceeding one penny halfpenny, until the

expiration of five years after the passing of this Act, and afterwards per ton per mile not exceeding one penny;" in the carriages of the company, whether before or after the five years, "an additional sum per ton per mile not exceeding one eighth of a penny." The 4th sub-section was for all goods "(for which no other payment is herein imposed) per ton per mile not exceeding twopence;" if conveyed in the carriages of the company "an additional sum per ton per mile not exceeding one halfpenny." Another sub-section provided the toll for conveying any carriage, which was to be "per mile, not exceeding sixpence, and a sum not exceeding twopence per mile for every additional quarter of a ton, or fractional part of a quarter of a ton, which any such carriage may weigh; and if such carriage be conveyed on a truck or platform belonging to the company, an additional sum per mile not exceeding twopence." As to passengers and animals the words used were "per mile, not exceeding," &c.

The 105th clause enacted "that the following provisions and regulations shall be applicable to the fixing of such tolls . . . For articles or persons conveyed on the railway for a less distance than four miles, the company may demand, in addition to the prescribed tolls for conveyance, a reasonable charge for the expense of stopping, loading, and unloading:

"For a fraction of a mile beyond four miles, or beyond any greater number of miles, the company may demand tolls on merchandise for such fraction, in proportion to the number of quarters of a mile contained therein, and if there be a fraction of a quarter of a mile, such fraction shall be deemed a quarter of a mile; and in respect of passengers, every fraction of a mile beyond an integral number of miles shall be deemed a mile:

"For a fraction of a ton, the company may demand toll according to the number of quarters of a ton in such fraction, and if there be a fraction of a quarter of a ton, such fraction shall be deemed a quarter of a ton."

The 146th clause enacted that "the word 'toll' shall include any charge or payment for any passenger, animal, or goods, conveyed upon any canal or railway," &c.

The *Railways Clauses Consolidation Act*, 1845 (8 Vict. c. 20), at sect. 93, required that the list of tolls "authorized by the Special

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Act, and which shall be exacted by the company, shall be published by the same being painted upon one toll board or more in distinct black letters on a white ground," &c. The 94th section required milestones to be erected, and the 95th section declared that the tolls were to be taken only whilst the board was exhibited and the milestones set up.

The toll board at Pill Bank Junction, on the Plaintiffs' railway, contained, after the 27th of May, 1873, the following notice: "Notice is hereby given that on and after the 1st of June, 1873, a toll of 2½*d.* per ton, for the expense of 'stopping,' will be made in addition to the statutory maximum tolls payable for the distance traversed, on all articles conveyed by the *Monmouthshire Railway and Canal Company* on the railway, for a less distance than four miles, between the railway of the *Brecon and Merthyr Railway* at *Basselleg*, and the second terminus of the *Monmouthshire Railway and Canal Company* at *Newport*, and that such toll is to be paid to the collector of tolls at this weighing machine."

The Defendants in the action were persons who used the line of railway for the conveyance of their goods, and very often for distances less than four miles. In many cases stoppages occurred at the sidings of the line, until the train of trucks could be made up, and sometimes until one part of the line could be signalled "clear." The weighing also occupied a considerable time. In addition to the charges for conveyance, the Plaintiffs claimed to be paid a reasonable sum for the stoppages in distances within four miles. The Plaintiffs also made a charge for conveyance for full quarters of a mile, and for fractions of a quarter of a mile, where the whole length of transit was within four miles. The Defendants denied their right to make such charges.

Three questions were raised for the consideration of the Court. First, whether the Plaintiffs were entitled to make any charge for stopping, and if so, upon what principle? Second, whether they were entitled to make, when the distance was within four miles, any charge for any and what fractional part of a mile? Third, whether the total charge for all services (including the stopping, if the Court should think the charge for stopping is legal) is limited to one penny per ton per mile? And it was also objected by the Defendants that the tolls for stopping and unload-

ing had not been published on a toll board, as required by the *Railways Clauses Consolidation Act.*

A verdict had been taken for the Plaintiffs on both charges—a rule for a new trial was obtained, but after argument discharged, and judgment given for the Plaintiffs. On appeal the case was heard by Lords Justices *James, Mellish*, and *Baggallay*. Their Lordships all agreed that the charge for stopping was not a "toll" within the meaning of the Acts, and therefore could be claimed, though not formally put upon a toll board within the provisions of the *Railways Clauses Consolidation Act*, 1845. And Lords Justices *James* and *Baggallay* were of opinion that the claim of toll for fractions of a mile on distances within four miles was justified by the words of the 104th section of the Act; but Lord Justice *Mellish* was of a different opinion. The decision of the Court below thus standing affirmed, the present appeal was brought.

Mr. *H. Matthews*, Q.C., and Mr. *Arthur R. Jelf*, for the Appellants, contended that on the true construction of the Respondents' Act they were not entitled to charge tolls for fractions of a mile within the four miles. The Act provided for the payment of so much per ton per mile, which could not be construed divisably, as if the words "at the rate of," had preceded this description of the charge, and consequently the charge could not be apportioned: *Rea* v. *Burnis* (1); *Ingledew* v. *Cripps* (2). And then, too, the words were in an Act obtained by the Respondents themselves, and on that account must be construed strictly against the Respondents. And that principle of construction must also be applied to them because they imposed a toll upon the public: for no charge could be imposed upon the public except by the clearly expressed intention of the Legislature: *Stockton and Darlington Railway* v. *Barrett* (3). Here not only was no such intention expressed, but the phrase "per ton per mile," shewed that where the Legislature had not mentioned fractions of miles, no such charge was intended to be permitted. Nor were the Respondents entitled to charge tolls for stopping, without having first published the same on a toll board, according to the provisions of the *Railways Clauses Con-*

(1) 2 Lev. 124. (2) 2 Ld. Raym. 814.
(3) 11 Cl. & F. 590.

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solidation Act, 1845 (8 & 9 Vict. c. 20, ss. 93, 95). These charges were plainly tolls for the use of the railway, and there not having been any such publication of them as the statute required, they could not be enforced.

Mr. *Benjamin*, Q.C., and Mr. *A. T. Lawrence*, for the Respondents argued that, as the Respondents were bound to carry the commodities, they were entitled to compensation for their conveyance, whether the distance was for a whole mile or only a part of it, and the intention of the Legislature granting charges for fractions of a mile being clearly expressed in some parts of this particular Act, shewed that such charges were considered fairly demandable in respect of the services performed. A quarter of a mile within four miles was as much a distance, for travelling which the company was entitled to compensation, as a quarter of a mile beyond four miles, and the Legislature never had intended to make any distinction between the two distances. Then as to the principle affecting the imposition of a tax on the public. This was not a tax, but a payment for services rendered, and was therefore untouched by the application of any general rule relative to fiscal acts. As to the charge for stopping, it was distinctly authorized by the Act. It was not what could properly be described as a toll, and therefore did not fall within the provisions of the *Railways Clauses Consolidation Act* of 1845, but was a special charge for a special service, necessarily varying from time to time, and was of course different in each particular instance.

Mr. *H. Matthews* replied.

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THE LORD CHANCELLOR (Earl *Cairns*):—

My Lords, the cases which have decided that Taxing Acts are to be construed with strictness, and that no payment is to be exacted from the subject which is not clearly and unequivocally required by Act of Parliament to be made, probably meant little more than this, that, inasmuch as there was not any *à priori* liability in a subject to pay any particular tax, nor any antecedent relationship between the tax-payer and the taxing authority, no reasoning founded upon any supposed relationship of the tax-payer and the

taxing authority could be brought to bear upon the construction of the Act, and therefore the tax-payer had a right to stand upon a literal construction of the words used, whatever might be the consequence. I cannot think that this principle applies, to any considerable extent, where the payment spoken of in the Act of Parliament is a payment to be made in return for services rendered, and above all in a case where Parliament does not step in to give the right to payment, but rather to moderate and limit a right to payment which otherwise might exist without limit, or at all events with only such limits as would be placed upon it by a *quantum meruit* assessment.

Approaching the construction of the 104th section of the Act of the Respondents from this point of view, it is obvious that it intended to deal with the remuneration of the company for service performed, viz., the supplying and maintaining a railway for the passage of carriages, and, farther, the conveyance of articles of merchandise upon the railway in carriages belonging to the company itself. The first words are affirmative: "It shall be lawful for the company to demand;" but these are immediately followed by negative words, "not exceeding," and the result of the whole is to substitute for the remuneration which the Respondents might have obtained, either by agreement in particular cases, or by asserting a right to be paid for the value of their services, a maximum payment for the use of their railway and their service as carriers, which payment they are not to be at liberty to exceed. The payment fixed by the Act of Parliament must, therefore, be in its nature analogous to, and of the same character as, that which the Respondents would have required if the amount of their demand had not been limited, and it is obvious that they would have required, and would have been entitled to require, payment for a part of a mile as well as for a completed mile. It appears to me, therefore, that unless the right to require payment for a part is excluded by words which are reasonably free from doubt, it must be assumed that it has not been excluded. It would be foreign to the whole object of such clauses to require that a company should carry merchandise for a part of a mile, not for a sum limited in amount, but for no sum whatever. The words of the section, however, appear to me in no wise to justify the contest of the

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Appellants. They point, as it seems to me, to a rateable charge, rateable *quoad* the ton, and rateable *quoad* the mile; and although the word "rate" is not expressly used in the 104th section, it is used in the 106th, where the words are "the rate of tolls hereby prescribed," that is, prescribed in the 104th section.

This, I think, being the reasonable construction of the 104th section, the 105th section does not in any way cut it down or alter it. It certainly does not in words profess to do so, and with regard to the distance beyond four miles, the power is not to charge for fractions, but for fractions in proportion to quarters, and to charge for a fraction of a quarter as a whole quarter. To authorize this to be done express words were clearly necessary.

On this part of the case, which was the only part on which at the time of the argument your Lordships entertained any doubt, I think the decision of the Court of Appeal was right, and that the appeal should be dismissed.

LORD PENZANCE:—

My Lords, there were two questions raised in this case.

As to one of them, namely, the right of the company to make a reasonable charge for stopping, loading, and unloading without publishing such charge on their toll-board, there was no difference of opinion in the Court below, and is none, I believe, in your Lordships' House.

The other point is one of more difficulty. The Respondents were empowered by Act of Parliament (8 & 9 Vict. c. clxix) to charge tolls for the carriage of goods at charges to be fixed by them, not exceeding a certain sum per ton per mile; and the question is whether this power enables them so to fix these charges as to include a rateable payment for fractions of a mile when the distance travelled is within four miles.

The argument mainly urged in favour of this right was this—that if this right be not accorded, the company might carry a number of tons for some distance less than a full mile, or complete number of miles, without being entitled to any remuneration for so doing. And your Lordships are asked to conclude that the Legislature could not possibly have intended such a result. The weight of this reasoning was perhaps diminished in the course of

the argument, during which it was pointed out that the Respondents are not really bound to carry any goods except as carriers "for hire," and that if any work is done by them as carriers, in respect to which no toll as such is payable, they would be entitled to payment for it on a "*quantum meruit*;" and farther, that there is a clause in the general Act relating to railways under which they might in such cases have relief.

But however this may be, on which I give no opinion, I think the principle on which clauses such as those now in question have hitherto been construed in Courts of Justice, is undoubted.

That principle, my Lords, was stated very clearly in your Lordships' House in the case of *The Stockton Railway Company* v. *Barrett* (1) by Lord *Brougham* as follows: "It must be observed that '*in dubio*' you are always to lean against the construction which imposes a burden on the subject; the intention of the Legislature to impose a tax must be clear; it was so held in the case of *The Hull Dock Company* v. *Browne* (2), which both parties in this case relied on for other purposes, and which the Plaintiffs in error especially cited in support of their view. 'These rates,' said Lord *Tenterden*, 'are a tax upon the subject, and it is a sound general rule that a tax shall not be considered to be imposed (or at least not for the benefit of a subject) without a plain declaration of the intent of the Legislature to impose it.' The like law had been laid down by the Court of King's Bench in the case of a company claiming against the public, *Gildart* v. *Gladstone* (3), where Lord *Ellenborough* said, 'If the words would fairly admit of different meanings, it would be right to adopt that which would be more favourable to the interests of the public and against that of the company, because the company, in bargaining with the public, ought to take care to express distinctly what payments they were to receive, and because the public ought not to be charged unless it was clear that it was so intended.' Many other cases might be cited which concur in the same reasonable view." Lord *Lyndhurst*, the only other Peer addressing the House, relied upon the same principle of construction, and in like manner based his judgment upon it.

(1) 11 Cl. & F. 590, at p. 607. (2) 2 B. & Ad. p. 58.
(3) 11 East, 675, at 685.

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No doubt, in times now past, there was a much greater tendency in Courts of Justice than at present, to frame and act upon abstract rules for the construction of statutes, and the change has probably been beneficial. But I am unwilling to accept the gradual relaxation of some highly technical rules as a reason for abandoning a principle such as that above quoted, which rests, I think on a sound basis of reason and fairness. Acts of Parliament such as that under consideration are framed and offered to Parliament by the companies who are asking for powers and privileges which the common law does not give them. They take power to make a railway and other works over the lands of other people, and that power is only conceded to them upon the footing that it is for the benefit of the public as well as themselves. This benefit they profess to secure to the public by giving the use of the line to all comers, or undertaking to carry their goods, upon payment of certain charges or tolls. The nature and limits of these tolls and charges they fix for themselves, and submit them to the Legislature in their bill expressed in their own language, and I think it is a fair and reasonable thing to say to them, that by the language of that bill, when it becomes law, they are strictly bound.

If the language of their clauses, strictly construed, puts them at any disadvantage in their dealings with the public which the Legislature did not intend, it is the fault of those who had the opportunity of insisting upon language which would adequately express that intention; and they are asking Courts of Justice to tread on dangerous ground, as it seems to me, when they seek to supply a deficiency in the actual language of legislation, by what they assert to be a reasonable intendment to be inferred from the probabilities of the case. It may well be that in dealing with the Legislature, a charge, reasonable enough in itself, in one direction, was surrendered by the company in consideration of benefits secured in lieu of it in some other direction, and in this state of things, unless the clauses as they stand do not admit of any reasonable meaning at all, without the addition of something else which has not been expressed, I think the rule hitherto established and acted upon of giving effect to the language strictly construed, and nothing more, is one that ought to be adhered to.

What, then, is the language of the clauses in question? The 104th section of 8 & 9 Vict. c. clxix, confers upon the company power to demand any tolls "not exceeding the following (that is to say), in respect of the tonnage of articles conveyed upon the railway or any part thereof, for all coals per ton per mile not exceeding three farthings."

The form which this clause takes, therefore, is that of a permission to fix their own tolls, followed by the expression of a limit which they are not to exceed. In construing such a clause no difficulty can arise, except such as may be found in construing the limit intended to be expressed. That limit is declared to be this, that the toll shall not exceed, "in respect of the tonnage" of the goods, a certain sum "per ton per mile."

It is obvious that there are no words here which are expressly applicable to anything but tons and miles. It is not said "at the rate of" so much per ton per mile, which would be the natural and obvious method of expressing a rateable charge, and there is no express mention of any payment for fractions. The toll which is not to be exceeded is expressed as a toll "per ton per mile," without more; and the question is, whether a toll which, in addition to a sum "per ton per mile," provides payment for parts or fractions of a mile, does not exceed such a toll? I confess that I think that it does. I have not failed to consider with great care the distinction put forward by Lord Justice *James* in the Court of Appeal. He expressed himself satisfied that "if the words had been giving them for the use of the railway 'a penny per ton per mile,' they could not probably have charged a *pro ratâ* sum for a fraction; there would have been no words in the grant giving them a halfpenny for half a mile, and the absence of those words could not probably have been supplied by implication." So far, then, the Lord Justice's opinion coincides with that which I have just expressed as to the exclusion of any rateable charge in the definition, strictly construed, of the toll which is not to be exceeded. "But," says the Lord Justice, "the words enable them to fix their own charge within certain limits for the use of any part of their railway. Can it be said that in fixing a halfpenny for half a mile they have exceeded a penny per mile?" And he then goes on to express his opinion that in this view of the matter

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the limit had not been exceeded by the imposition of a fractional charge.

The Lord Justice's reasoning, as I understand it, is based upon the introduction into the clause of the words "or any part thereof," when speaking of the railway, which words he considers sufficient to confer upon the company the right to make a charge for part of a mile. But if the true meaning of the words "per ton per mile" does not include fractions of tons or miles, the application of these words by the context of the clause to the railway, "or any part thereof," can only, as it seems to me, extend the toll to such "part thereof" as consists of completed miles. In other words, it is, I think, more reasonable to limit the generality of the words "or any part thereof," by the definition of the toll which is precisely described, than to extend the toll beyond that description by words which may be easily so read as to conform to it.

In the course of the argument another distinction was insisted upon. It was urged that although power to take a specific toll described as "per ton per mile," would not include fractions, yet that a power to fix a toll which did not exceed a toll "per ton per mile" might be lawfully exercised by fixing a toll which did not include fractions. I feel unable to rest upon what seems to me so thin a distinction. Whatever a toll "per ton per mile" may mean, it must I think, mean the same thing, whether it is expressed as a toll which may be taken, or as a toll which may not be exceeded; and agreeing as I do with the Lord Justice *James*, that such a definition, if found in the grant of a toll, would not carry with it a right to charge for fractions, so neither has it that effect when used as the description of a toll the limits of which are not to be exceeded.

So far upon the construction of sect. 104, if it had stood alone. But sect. 105 appears to me to point strongly in the same direction. In sect. 105 certain regulations are declared to be applicable to the fixing of the tolls under sect. 104. These regulations are, that for goods carried on the railway for a less distance than four miles the company may make certain special charges for stopping, loading, and unloading, and that "for a fraction of a mile beyond four miles," the company may demand "for such fraction of a mile in proportion to the number of

quarters of a mile contained therein; and if there be a fraction of a quarter of a mile, such fraction shall be deemed to be a quarter of a mile."

A broad distinction is therefore taken between a distance of four miles or less, and any distance beyond four miles. For the longer distance power to charge for fractions of a mile is expressly given in the form which is usual in Acts relating to railways, while for the shorter distance no provision of the kind is made.

When to this it is added that in the previous Acts of Parliament by which the works ultimately represented by this railway company have been authorized, a provision has been uniformly inserted for fractions of weight or distance, and express powers granted for making them the subject of charge, the omission to confer any such power for this particular short distance of four miles, in respect of which other and unusual charges are authorized, looks very like an intention on the part of Parliament to withhold it. The Acts to which I refer are the 32 Geo. 2, c. cii, s. 91, which gives power to charge per ton per mile, "and so in proportion," &c., and the statute 42 Geo. 3, c. cxv, which by sect. 28 gives express power to charge for fractions of a mile in a similar form to that which is found as applicable to distances beyond four miles in the statute now under discussion.

The conclusion, therefore, my Lords, at which I arrive is this, that no express power has been conferred upon this company to fix a toll for fractions of a mile within the distance of four miles, and that such a power ought not to be supplied by intendment or implication.

This appeal ought, therefore, in my opinion, to be allowed, and the judgment of the Court below, reversed.

LORD O'HAGAN:—

My Lords, on the question as to the right to enforce charges for stoppage, loading, and unloading, without previous publication, the Exchequer, the Exchequer Chamber, and the Court of Appeal, were of the same mind, and I believe your Lordships all agree with them. The shifting and uncertain nature of those charges makes previous specification of them manifestly impracticable. The obligation to publish must apply to claims capable of being

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appreciated and prescribed beforehand, and the words of the statute are not inconsistent with the reasonable view that it should be limited to them. On this point, I need say no more.

The more difficult question arises as to the construction of the 104th and 105th sections of the Respondents' Act, and, on the one point really in controversy, we are not assisted to a conclusion by any unanimity, or even preponderance of opinion amongst the learned Judges who have had occasion to consider it. For, although the formal judgment of the Exchequer and the Exchequer Chamber has been in favour of the Respondents, and that judgment has been sustained in the Court of Appeal by Lord Justice *James* and Lord Justice *Baggallay*, the adverse view of Lord Justice *Mellish* is not encountered by any previous decision —the former rulings having been made merely on concession and consent—whilst it is supported by Mr. Baron *Bramwell*, who appears to have held that, under the legislation with which we have to deal, the Respondents were not entitled to charge for a fractional part of a mile. For that learned Judge I have much respect, and, before I proceed to state briefly the grounds of my concurrence with him and Lord Justice *Mellish*, I shall cite a passage from his judgment in the Court of Exchequer (1), to which attention was not called in the course of the argument. After disposing of questions not now in dispute, he says, "Now we come to the answer to the second question, which is, 'whether the Plaintiffs are entitled to charge the Defendants the railway toll and locomotive toll, or either, and which of them, for any, and if so, what fractional part of a mile traversed by the Defendants' trucks?' If I had to answer that question as it is put, without reference to the admission that is to be made, I should be under a difficulty; and I really must state it, because it is a difficulty I feel, and it is right I should give expression to it. I should not be stating the truth if I said I thought they were." After reading the 105th section, he adds, "One would think that this power, given to them where it was beyond four miles, was not given to them, or was taken away from them, if it otherwise was given to them, when it was under four miles; and when you come to consider that in the previous part of the Act of Parliament, where they have power to

(1) Printed papers in the case, p. 60.

charge tolls, the power is not to charge at the rate of so much per mile, but to charge so much per mile, it would certainly look very much as though they were not entitled to charge anything for fractions, but only for whole miles." "I am by no means sure that the reasonable charge for the expense of stopping, which is applicable to where it is under four miles, was not intended to be given to them as a compensation for their not being able to charge for the fractional part of a mile." The other Judges of the Exchequer acted on the concession of the Defendants, and did not pronounce any considered judgment of their own, although the reasoning of the Chief Baron would seem to me to lean to the result accepted by Mr. Baron *Bramwell*.

In approaching the interpretation of the statute, I do not feel affected by two considerations which appear to have exerted much influence on the judgment of the Court of Appeal. The first of these rests on the undoubted fact that the construction of the Respondents has been accepted and acted on for many years, as well by freighters and merchants, who have paid the fractional toll, as by Courts of Justice in some cases to which we have been referred. But it is admitted that the matter had not been *res judicata;* and when, on consent and without discussion, it was arranged according to the present contention of the Respondents, the expression of judicial protest which I have read, accompanied the pronouncement of the formal ruling. We have no means of knowing from what motives the traders made the concession on which the Courts proceeded; and we must not forget, as I shall make appear more fully hereafter, that the antecedent statutes, which affected the company's railway and canal, contained clauses expressly authorizing the fractional charges. Under them the payment of those charges must have become habitual, and they may, not unnaturally, have induced the supposition that it might also be held leviable under the latest Act.

The second consideration, which is repeatedly relied on in the judgment of the Lords Justices, is the unreasonableness of supposing that the Legislature could have intended quantities of goods to be carried for nothing, as they must sometimes be if fractional charges are not legally claimable. But, at most, the presumption raised by that consideration can only make us more careful in ascertaining

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the real meaning of the Act; and though that meaning, rightly appreciated, should involve such a result, we are not at liberty to reject it on that ground only.

The Respondents had the preparation of their own measure, and were bound to see that it fitly expressed the purposes of Parliament. They were not forced to adopt the Act if they had reason to complain of its harshness or injustice; and it behoved them to have any terms, favourable to themselves and involving burthens on the public, explicitly and unequivocally stated. If they have not done so the fault is theirs, and they must take the consequences.

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But besides, as has been observed both by Lord Justice *Mellish* and by Mr. Baron *Bramwell*, the insertion of the clause as to claiming for stoppages, &c., in the company's interest, may have been made to compensate for the denial of the fractional charges under the four miles, within which they were to enjoy that new and important privilege. The suggested substitution might perhaps have been fairly made by Parliament, and wisely assented to by the company, and we have no ground for saying that it was not. I do not think we need to discuss or decide the question as to recovery on a *quantum meruit*. I prefer to rest on the grounds I have stated, as shewing that this second consideration is not decisive on the legal issue as to the construction of the clauses.

But there is a third consideration which seems to me of much materiality with reference to that construction. The statute immediately before us is only, as I have said, the last of a series, all *in pari materiâ*, and all directly dealing with the works of the Respondents and their relations to the public. They should, therefore, according to a familiar principle, be read together; and when we find the right to make fractional charges and take proportionate tolls expressly given in all of them but the last, we are bound, I think, to notice the significant omission. We must find, if we can, some better reason for it than the oversight or error of the Legislature; and we may recognise such a reason when we see, in the added provision for stoppage, an apparent compensation for the lost power of charging for less than a mile.

If, after the words "per ton per mile not exceeding three

farthings," the words "and so in proportion" had been introduced, as in the preceding Acts, the controverted right would have been beyond dispute, and is it unreasonable to presume that they were not inserted, because the proportionate claim was not meant to be allowed?

Reading, then, the 104th section in connection with the previous legislation, and the provisions of the 105th, and finding that it gives power to charge merely "per ton per mile," there appears to me to be nothing startling in the assertion that the charge was to be for an entire mile, and not rateably or for a portion of a mile; and I do not think it is made so by the preceding words "not exceeding the following," and "upon the railway or any part thereof;" for if it was intended that the subject matter of the charge should be merely carriage for a full mile, the excess forbidden would apply only to that mile, and "the part of the railway" must be such a part as would comprise at least a mile. In one sense, by fixing a halfpenny for half a mile, the Respondents would not exceed a penny per mile, but if their power to charge only extended to the whole mile, and only to a part of the line comprising a mile, they could not exercise it as to smaller portions merely because they might halve the toll. Whether or no the power was so limited is the question; and it seems to me very like a *petitio principii* to reason on the assumption that it was not.

I do not affirm that the construction of the 104th section is free from difficulty. On the contrary, I agree with Lord Justice *Mellish* that there is "considerable ambiguity" about it; and I cannot say that, to my mind, that ambiguity has been removed by the argument we have heard on the use of the preposition "*per*." In certain instances its meaning may involve rateability or proportion, but Lord Justice *James*, who relies upon this point, seems to me to supply an answer to it when he admits that, if the section had merely given for the use of the railway "a penny per ton per mile," the company could not probably have charged a "*pro ratâ*" sum for a fraction. If so, the word "*per*" alone would not found the claim to charge, and the Lord Justice is therefore obliged to call in aid the words "not exceeding" and "part of the railway," on the effect of which I have already

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observed. For the reasons I have given they do not appear to me at all conclusive in favour of the fractional charge.

But assuming that the 104th section is ambiguous and might be difficult of construction, if we had nothing else to guide us, I think we are assisted to a reasonable interpretation by the section which succeeds. It provides expressly "for a fraction of a mile beyond four miles or beyond any greater number of miles." It gives the Respondents power to demand tolls on merchandise "for such fraction in proportion to the number of quarters of miles contained therein;" and, as to the carriage of goods for a less distance than four miles, it authorizes them to make a reasonable charge for stopping, loading, and unloading, but leaves them without any claim for fractions of a mile. Does not this express bestowal of the power to charge beyond the four miles, involve the denial of it within that distance? "The words seem to me," says Lord Justice *Mellish*, "obviously to assume that the company had not been enabled to charge for a fraction of a mile by the previous section." Those words make a clear distinction between the distances within and beyond the four miles, which the construction of the Respondents would nullify, and they give different rights in connection with those differences, which it would appear to confound. The specific grant of the power of fractional charge in the 105th section, makes it improbable that, if such a grant had been designed by the 104th, it would not have been as clearly, as it might have been easily, given; and the argument I have derived from the presence of such a provision in previous statutes, and the absence of it in that with which we have to do, appears to me to acquire accumulated force from the contrast of the sections in this respect.

If the 104th section had given the right of fractional charges in clear and express terms, it might have been difficult to say that the 105th section took it away by implication. But, as I have said, I do not think it was so given. At the utmost, the first section seems to me ambiguous, and open to two constructions; and we have from Lord Justice *James* the admission, as to the second, that "the implication (relied on by the Appellants) is no doubt very strong." It is plainly so; and I cannot believe that its strength is diminished by the suggestion that "superflous words" may have been "carelessly and blunderingly thrown in or

left in," or by the argument from "unreasonableness" with which I have endeavoured to deal already. We are, I repeat, to take the language as we find it. We are not, sitting here judicially, "to presume the intentions of the Legislature, but to collect them from the words of the statutes." *Dwarris* on Statutes (1).

Keeping in mind this established canon of construction, I cannot see that the "very strong implication" is encountered by any argument, either from the reason of the thing or the language of the Act, which should make us refuse to accept it; whilst the introduction of the power to charge for stoppages, &c., within the four miles, which it would relieve from proportional tolls, goes far, in my opinion, to confirm it, and explain the motive on which it may have been grounded.

I believe, my Lords, that the ambiguity of the 104th section has been very much removed by the clearness of the 105th; but if it still partially remained, I should say that the rule relied on by my noble and learned friend who last addressed your Lordships, which requires the imposition of a tax or toll to be clear and distinct, and, in cases of doubt, compels the adoption of the meaning most beneficial to the public, should be applied to this case. The Respondents sought the Act, directed the preparation of it, obtained large powers and privileges under it, had the option to accept it or reject it, and may fairly be bound by a strict construction of its words in favour of the general community. I think that the doctrine which would so bind them, even if the legislation had been ambiguous, settled as it is by many cases, is wise and reasonable and ought to be maintained.

For these reasons, I am of opinion that the appeal should be allowed, and the judgment reversed.

LORD SELBORNE:—

My Lords, I am of opinion, on the first point, that the office of the 104th section of the Act of 1845 is, not to fix a ton and a mile as separate units for the purpose of charge, but to enable the Respondents to charge such tolls and at such rates as they may think fit in respect of the conveyance of the different classes of goods therein mentioned, so long as they do not exceed the

(1) Page 703.

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maximum rates to which they are thereby entitled. Therefore, according to the distinction taken in the authorities cited from *Levinz* and Lord *Raymond*, it is *secundum ratam*, and not only on a fixed quantity or distance, that they may charge; and so interpreting the section, those authorities are against the Appellants. I will not dwell upon the mere reason of the thing, which does not seem to me to be at all favourable to the Appellants' construction; I am content to rely upon what I consider the proper and natural meaning of the words used. The governing words are, that "it shall be lawful for the company to demand any tolls for the use of the railway not exceeding the following." The consideration for those tolls, here expressed, is not the conveyance of each separate ton of goods, but is "the use of the railway" by the person whose goods are conveyed; and what the Respondents may demand are "any tolls," so long as they do not exceed the prescribed limits. Lord Justice *Mellish* agreed with the other Judges of the Court of Appeal in holding that the charge actually made by the company did not exceed the prescribed limits; and it cannot be disputed that the railway is used as much when goods are conveyed over a fraction of a mile as when they are conveyed over an entire mile. These governing words are followed by others which immediately introduce the enumeration of the maximum rates, viz. "in respect of *the tonnage* of articles conveyed upon the railway, or any part thereof, as follows:" shewing (I think) that a maximum scale of tonnage rates was intended. A tonnage rate is (as it seems to me) as much applicable to half a ton as to a whole ton; and the same principle of interpretation which in this context is applicable to quantity, must, (I conceive) be equally applicable to distance. And I agree with Lord Justice *James* that the Latin preposition "*per*," as it is adopted into our popular language, and as it is here used, properly and primarily signifies the distribution of the charge over the whole aggregate weight of goods for the whole aggregate distance that they are conveyed, tons and miles being mentioned only as common measures of weight and distance convenient for the purpose of the measurements which this maximum scale would necessarily require. Farther proof of the same proposition seems to me to be derived (as the Respondents' junior counsel pointed out) from the words "the rate of tolls" in sect. 106.

The next question is, whether the 105th section operates, by implication, to take away the right, which (without it) the 104th section would in my opinion confer, to charge in respect of distances less than four miles for any fraction of a mile.

To raise such an implication without necessity could not, I think, be right. It might be necessary, if the 105th section would not be sensible and *officious* without it; but it is both sensible and officious, though no such implication is made. The object of that section is, not to cut down the tolls authorized to be taken by sect. 104, but to superadd certain "provisions and regulations," which "shall be applicable to the fixing of such tolls, and also to the tolls payable for locomotive power." So far as these "provisions and regulations" are applicable they are (of course) to be applied, but they leave untouched everything authorized by the preceding section to which they are *not* applicable. Their express words are not applicable to any charge of tolls for a fraction of a mile when the whole distance travelled over is less than four miles. They do not regulate or provide for it, but neither do they prohibit it. They regulate four special cases, and that always in such a way as to enable the Respondents to charge more in those cases than they could have done under the 104th section standing alone. First, if the distance travelled over is less than four miles, there may be a charge for stopping, loading, and unloading, besides the tolls authorized by the 104th section. The words are "*in addition to the prescribed tolls* for conveyance," which is plainly inconsistent with the supposition that the prescribed tolls were (in any case in which this additional charge might be made) to be less than they otherwise might have been. The next case is that of conveyance of goods for any distance beyond four miles, in which case the company are by this clause enabled to charge for a fraction of a quarter of a mile as if it were a full quarter of a mile—a benefit which of course they cannot claim in a case (such as that before the House) to which that provision is inapplicable; but it does not, therefore, follow that the right to charge for a fraction of a mile according to the distance (being less than four miles in the whole) over which any goods may have been actually conveyed is thereby taken away, if given by the previous section. The third case is that of passengers, as to whom the company is by this clause enabled to charge for every fraction of a mile beyond an integral

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number of miles as if it had been a whole mile. The fourth provision relates to the measurement of the quantity of goods conveyed; it enables the company to charge for every fraction less than a quarter of a ton as if it were a whole quarter of a ton, without reference to the distance over which the goods may have been conveyed. All these provisions, therefore, are in favour of the company, and they will all receive full effect in the cases to which they may apply, though they are not held to govern, directly or by implication, the case now before the House.

Upon the second point, I think it sufficient to say that I agree with the judgments of the Court below.

My opinion therefore is, that this appeal should be dismissed. Perhaps it may be proper to add, that I cannot think it right to refuse to the 104th section what appears to me to be its proper effect, according to the true and reasonable construction of its words, merely because it may have been usual in other Acts of Parliament (some of them relating to undertakings now incorporated with this railway) to provide for the right to charge for fractions of miles in express terms, which is not here done, except in the particular cases regulated by the 105th section. And with respect to the principle laid down in some authorities, that statutes of this kind, authorizing tolls to be taken by undertakers of public works, are to be construed as if they were Taxing Acts, imposing a burden on the subject, and therefore not to be extended so as to increase that burden beyond the strict meaning of their words, I have already stated that I think it would be necessary, in the present case, to place upon the words of the Act, not their strict and natural, but a forced and unnatural construction, in order to arrive at a conclusion in the Appellants' favour. If those authorities were to be understood as meaning more than that express powers of taking tolls conferred by the Legislature are not to be extended by any unnecessary implication beyond the fair and natural import of the words used, I should doubt whether they were sound in principle, or binding on this House.

THE LORD CHANCELLOR:—

My Lords, your Lordships being equally divided in opinion, of of course according to the ancient rule, the question that the decree appealed against be reversed, will be determined in the

negative. I am anxious, my Lords, to say a word upon the subject of costs, more particularly because I observe that in a case in this House a few years ago, the case of *Anderson* v. *Morice* (1) a question was raised as to costs in the case of an appeal where the numbers for affirming and for reversing the judgment appealed against were equal. I did not myself take part in that decision, but I observe that what was ultimately done was that nothing was said in the order upon the subject of costs. Some observations, however, then fell from some members of your Lordships' House which appear to give countenance to the idea that the reason why nothing is said about costs when there is an equal division of votes is, that it is somewhat contrary to justice or to the practice of the House, to give costs where there is any division of opinion. Now, my Lords, I apprehend that that is not at all the principle upon which your Lordships proceed in a case like the present. There are upon these occasions always two separate motions proposed to the House. The first is the motion that the decree appealed against be reversed. That motion may be rejected by a majority, or it may be carried by a majority, or the numbers of contents and not-contents may be equal, and thereupon the decree stands affirmed. But in all these cases, if anything is to be said about costs, a second motion is necessary. For example, if a decree stands affirmed and the appeal is dismissed, and if it is desired that the Appellant should be ordered to pay costs, a farther motion must then be made that the appeal be dismissed with costs, not for the purpose of obtaining the dismissal of the appeal, for that has been done by the first motion, but for the purpose of ordering the costs to be paid by the Appellant. Now it is obvious that if your Lordships are divided upon the first motion, and the votes for reversing the decree and for affirming it are equal, and the decree stands affirmed merely on account of the ancient rule that the presumption is in favour of the negative, the result of a second motion that the appeal be dismissed with costs, would be (unless, which is not to be supposed, the minds of some of your Lordships were to change in the interval) that the numbers would again be equally divided upon the second motion, and the presumption would again be in favour of the negative, and therefore the motion for ordering costs to be paid by the Appellant would not be carried,

(1) 1 App. Cas. 713; see p. 750.

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consequently the effect would be the same as if nothing were said about costs. I am anxious to guard against the idea going abroad among the public that the reason is the division of opinion, for there might well be a division of opinion amongst your Lordships, and yet be an order that the Appellant was to pay the costs. The true reason is that, in such a case as I have supposed, a motion ordering the Appellant to pay costs could not be carried.

LORD SELBORNE:—

My Lords, it is not necessary for me to say anything in addition to what my noble and learned friend has just stated; but perhaps it may be convenient for me to observe that that is precisely what I myself understood. I was a party to that discussion to which my noble and learned friend has alluded, and while I should not have been unwilling, if I had been very much pressed to do so, to waive my particular vote so as to create a majority, yet I was not anxious to do so, and I pointed out that which my noble and learned friend has now said, namely, that there are two motions, and that the rule that, where the votes are equal the presumption is in favour of the negative, would apply to the motion ordering costs to be paid as well as to the motion for the reversal of the judgment, and would have effects which are really consistent in principle, though at first sight they might appear otherwise, namely, that the judgment under appeal is affirmed on the first motion, but that the costs are not given as against the Appellant on the second.

The Question was then put,

"That the judgment under appeal be reversed."

The numbers being equal, two for affirmance and two for reversal, according to the ancient rule in the law, *semper presumitur pro negante*, the question was determined in the negative: the order of the Court of Appeal was affirmed, and the appeal dismissed.

Lords' Journals, 7th April, 1879.

Solicitors for Appellant: *Hunt & Son.*
Solicitors for Respondent: *Thomas White & Sons.*

[HOUSE OF LORDS.]

TURNER . . . . . APPELLANT;

AND

CRUSH AND ANOTHER . . . . . RESPONDENTS.

H. L. (E.)
1879
April 29.

Inclosure Act—Paths and Ways—Effect of Award.

The words of the 68th section of 8 & 9 Vict. c. 118 (the *General Inclosure Act*) are positive that all roads and ways not set out by the valuer on making his award, "shall be for ever stopped up and extinguished."

H. was possessed of lands in a neighbourhood where the *General Inclosure Act* was about to be applied. He sold some of these lands to *T.*, expressly reserving to himself the allotments that might afterwards be made. The conveyance to *T.* contained the usual words, "together with all ways, paths, passages, easements, privileges, advantages and appurtenances to the said lands appertaining, or held, used, or occupied therewith." Between the lands purchased by *T.* and the high road there were certain wastes over which the former holders of *T.'s* lands had, for above forty years, enjoyed the use of certain paths and trackways—which were paths and trackways of convenience, but not of necessity. The wastes were allotted to *H.*: the valuer, to whom *T.* had not preferred any claim of right to the paths and trackways in question, made his award, in which other paths and ways were set out, but not those from *T.'s* lands to the high road. Before the award was made *H.* had sold his interest in the allotments to *C.* who, after the making of the award, refused to allow *T.* the use of the ways in question:—

Held, that by the effect of the award they had been stopped up and extinguished, and that the conveyance by *H.* did not bind him to grant new easements over any land he might acquire by the allotment.

THIS was an appeal against a decision of the Court of Appeal directing judgment to be entered for the present Respondents, Plaintiffs in the Court of Exchequer, in an action of trespass which they had brought against Mr. *Turner* to try a question of right arising out of his claim to the use of certain ways over allotments which had been made under the *General Inclosure Act*, and of which they had become the purchasers. In 1869 Mr. *Hardcastle* was the owner of lands in the parishes of *Writtle* and *Roxwell* in the county of *Essex*. He sold some of these lands to Mr. *Turner*. It was at that time known that the *General Inclosure Act*, 8 & 9 Vict. c. 118, was about to be applied to these parishes. The conveyance to Mr. *Turner* described the lands sold, and conveyed them "Together with all lands, buildings, yards, gardens, orchards, walls, fences, hedges, ditches, timber,

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and timber-like trees, woods, underwoods, ways, paths, passages, drains, watercourses, lights, easements, privileges, advantages, and appurtenances, to the said farm lands and hereditaments hereby conveyed, or any of them, belonging or in any wise appertaining, or held, used, or occupied therewith, or known, accepted, or reputed, as part, parcel, or member thereof." There were certain wastes adjoining these lands, and lying between the lands sold and high road, and over these ways were certain trackways which had been used by the owners of the lands purchased by Mr. *Turner* for above forty years, as means of access to and from the lands to the high road. These trackways were ways of convenience but not of necessity. In the sale to Mr. *Turner* the expected allotments were expressly reserved to the vendor.

Mr. *Hardcastle* afterwards put up to sale by auction the allotments which he expected would be made to him under the *Inclosure Act*, and the 9th condition of sale provided that "Every lot is believed, and shall be taken to be, correctly described, and is sold subject to all chief and other rents, quit rents, suits, fines, heriots, and incidents of tenure, rights of ways and water, and other easements, if any, chargeable or subsisting thereon, whether mentioned in these particulars or not." Mr. *Crush* became the purchaser of these allotments. The proceedings under the *Inclosure Act* took place, the meetings, of which due notice was given, were regularly held, the valuer was duly appointed, and made his award, in which, though certain ways over the allotments were mentioned, nothing whatever was said as to the ways the use of which was claimed by Mr. *Turner* who had never made any claim, before the valuer, on the subject. That gentleman afterwards insisted that under the conveyance to him, and under the words used in the conditions of sale, he was entitled to the use of the trackways over the wastes. Mr. *Crush* contended that by the effect of the valuer's award under the *Inclosure Act* the paths and ways formerly used by the holders of Mr. *Turner's* lands were stopped up and extinguished (1).

(1) By 8 & 9 Vict. c. 118, s. 33, provision is made for the appointment of a valuer "to divide, set out, and allot such land among the persons interested," &c. They are fully described in s. 16, and Mr. *Hardcastle* came within the description.

By s. 46 the valuer is empowered to

An action was brought in the County Court of *Essex* to try this question, and judgment was given for the Plaintiffs. On appeal that judgment was affirmed (1). This appeal was then brought.

Mr. *Philbrick*, Q.C., and Mr. *T. Atkinson*, for the Appellant.

Mr. *Grantham*, Q.C., and Mr. *Croome*, for the Respondent.

THE LORD CHANCELLOR (Earl *Cairns*):—

My Lords, it is necessary in this case to observe what exactly it was which happened in the year 1869, when Mr. *Hardcastle* sold these lands, which were purchased by Mr. *Turner*, the Appellant. At that time Mr. *Hardcastle* was the owner of these lands and others in the same neighbourhood. He was not the lord of the manor, but in the neighbourhood of these lands were the wastes of the manor, and among others was the waste along the side of the road in the vicinity of Mr. *Hardcastle's* lands. In that state of things Mr. *Hardcastle* put up the lands, subsequently bought by Mr. *Turner*, for sale by auction, but he reserved to

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hold meetings for the examination of claims and otherwise, in the matter of such inclosure, as occasion shall require; and by s. 48 the claims are to be proved and determined by him subject to appeal to the Commissioners.

By s. 62 the valuer has power to alter roads and ways, subject, s. 63, to appeal. Other similar provisions are made, and allotments may be sold and the allotments, s. 84, conveyed to the purchaser.

By s. 68 "the valuer shall and may set out such private or occupation roads and ways through the lands to be inclosed as he shall deem requisite for the use of the persons interested in such lands or any of them;" and expenses incurred in the formation and completion of such private roads and ways as the valuer may direct shall be borne, and after the completion of such private roads and ways the same shall be maintained and kept in repair, by and at the expense of the owners and proprietors for the time being of the lands enclosed, or such of them, and in such shares and proportions, and in such manner as the valuer shall direct, and after such private roads and ways shall have been set out and made, the grass and herbage arising thereon shall for ever belong to and be for the use of such persons interested in the lands to be inclosed, as the valuer shall direct . . . . and after such setting out as aforesaid all private or occupation roads or ways, over, through, and upon the lands to be inclosed, which shall not be set out as aforesaid, shall be for ever stopped up and extinguished."

See farther as to how claims may be made before a valuer and his power to deal with them, 11 & 12 Vict. c. 99, s. 9.

(1) 3 Ex. D. 303.

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himself expressly the allotments, which were to be made of the waste lands under the proceedings then going on for the purpose of inclosure. Notice therefore was, on the face of the sale, taken of these proceedings, and the purchaser was warned that allotments were expected, and that therefore if allotments came to be made in respect of the lands offered for sale, these allotments would not pass to the purchaser, but be retained by the vendor.

Now all that was authorized by the *General Inclosure Act*. That Act enables persons who expect allotments to be made to them to sell their lands, reserving to themselves the right to the allotments when they come to be made. The purchaser therefore was warned that the allotment was in progress, and was put on his guard to be vigilant as to any rights in which he might be interested in respect of that allotment. In that state of things Mr. *Turner* bought the lands to which I have referred, and subsequently, the allotment having gone on and having been completed, an award of the pieces of land, the wastes of the manor, intervening between the road and the lands thus sold, was made to persons who claimed under Mr. *Hardcastle*, and who are the present Respondents.

But before I refer to the allotment I must direct your Lordships' attention to the form of conveyance made to the present Appellant. That conveyance passed to the Appellant the property sold to him with the general words:—[His Lordship read the words, see *ante*, p. 221.]

My Lords, the County Court Judge finds in the special case that, at the time when the conveyance which contained these words was executed, there were, over a piece of waste to which I have referred, intervening between the road and the lands sold to the Appellant, trackways or private roads used for the purposes of this land; and he finds that these trackways had been so used for upwards of forty years. I think it therefore better to take it that these were valid private rights of way at the time of the conveyance. Beyond all doubt, therefore, as it seems to me, the conveyance carried to Mr. *Turner* the land which he purchased and the ways appurtenant to that land, and among other ways those private ways over this waste piece of ground. But then it did that subject to whatever might be the legal consequences of the

inclosure then in progress. If that inclosure went off, if it came to nothing, or if the piece of land to which I have referred was not inclosed, then of course the right of Mr. *Turner* to his private ways would remain unaffected. But if it came to pass that these pieces of waste were inclosed, as happened under the allotment, then it appears to me that both Mr. *Turner* and Mr. *Hardcastle*, or any person claiming under them, must be bound by whatever is the legitimate consequence of the inclosure which was then proceeding under the provisions of the Act of Parliament.

Now, what says the Act of Parliament on the subject? The Act of Parliament says that it is to be the duty of those who are making an inclosure to take up the question of private roads over the lands which they are inclosing; and the valuer is to "set out such private or occupation roads and ways through the land to be inclosed, as he shall think requisite for the use of the persons interested in such lands or any of them." And if there be any question whether these words extend to other lands that seems to be removed by another enactment. Then it provides for the expenses of setting out those private ways. And it provides that "after such setting out as aforesaid all private or occupation roads or ways, over, through, and upon the lands to be inclosed which shall not be set out as aforesaid, shall be for ever stopped up and extinguished."

My Lords, these words are the words of the Legislature, and are as clear and distinct as any words can be; and unless there was some special contract between Mr. *Hardcastle* and the Appellant, at the time that he purchased, which bound Mr. *Hardcastle* not to take advantage of the provisions in this Act of Parliament, or not to allow the title which this Act would give him to be set up as against Mr. *Turner*, then it appears to me that the operation of the Act of Parliament is absolutely unfettered so far as Mr. *Hardcastle* is concerned, and that Mr. *Turner* has no right to complain of any consequences of the operation of the Act of Parliament. It was for him, knowing that the inclosure was in progress, to set up any case he could before the valuer and Commissioners as to the necessity of private roads across these pieces of waste in question. He took no such proceeding, and therefore must, as it seems to me, be held to have remained content with

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the other means of access he possessed to the land he bought. I can find nothing whatever in the transaction which took place which binds Mr. *Hardcastle*, or which can be said to bind the Respondents taking under Mr. *Hardcastle*, not to avail themselves of whatever are the legal consequences from the proceedings in the matter of the inclosure.

That, my Lords, is the whole case. I must say that I think the judgment of the Court of Appeal is entirely right, and I therefore move your Lordships that the appeal be dismissed with costs.

LORD SELBORNE:—

My Lords, I agree; and for the reasons given by Baron *Huddleston* in the Exchequer (1) and by Lord Justice *Thesiger* in the Court of Appeal (2).

The words "all ways" are ordinary, general words: and, as soon as the deed of 1869 was executed, these particular rights of way passed to the Appellant, as legally appurtenant to the land conveyed, and not otherwise: exactly in the same way as such rights of common, over the part of the waste now in question, or over any other parts of the wastes to be inclosed, also passed to him thereby.

Now as to all these other rights over the surface of the wastes, it would be inconsistent with the very nature and object of the proceedings under the *Inclosure Act* to suppose that the reservation, between these parties, of the allotments to be made under these proceedings to the vendor, could possibly have the effect intended by it if all these rights were to remain in the purchaser's favour, as if there had been no inclosure. If so, I cannot see any ground whatever for making a distinction as to rights of way which were equally liable to be extinguished by the process of allotment. The Appellant obtained, at the time of the conveyance, and by virtue thereof, everything which then belonged to the land; but he did so subject to the pending inclosure, and to the rights which Mr. *Hardcastle* might acquire in respect of any allotments, wheresoever situate, which might be made to him. If he desired to save the rights of way over this part of the waste,

(1) Printed papers in the case, p. 27. (2) 3 Ex. D. 309.

which passed to him by the conveyance, against any title which either Mr. *Hardcastle* or anyone else might acquire thereto by allotment, it was for him to take the necessary steps for his own protection, as much as if he had been the original owner of the purchased land, and not a purchaser from Mr. *Hardcastle*.

The Appellant's argument treats the general words in the deed of conveyance as if they had been a contract or covenant by Mr. *Hardcastle* to grant new easements over any land which he might acquire by allotment under the *Inclosure Act*. But for such a construction there is, in my opinion, no ground.

LORD GORDON concurred.

Order appealed from affirmed; and appeal dismissed, with costs.

Lords' Journals, 29th April, 1879.

Solicitor for Appellants: *Scarlett*.
Solicitors for Respondent: *Duffield & Bruty*.

[HOUSE OF LORDS.]

H. L. (Sc.) 1879 March 20.

MRS. WIGHTMAN, HUSBAND AND OTHERS . APPELLANTS;
MRS. COSTINE, WIDOW . . . . . RESPONDENT.

Agreement to disentail — Declaration of Trusts—Power of Revocation—Jus quæsitum tertio.

A father, being desirous to disentail his estate, procured the consent of the next heir, his eldest son. The minute of agreement between them provided that the father should pay absolutely to the son £4000; and secondly, should pay to trustees the further sum of £3000, for the benefit of the son; it being open to the father to limit the power and control of the son over the said £3000, to such extent, and in such manner, as he should think proper; "and in particular," to direct the trustees to hold it for the son's behoof "in liferent only, and for the issue of his body in fee, whom failing, to his nearest heirs and assignees."

Three months afterwards, a bond was executed by the father as security for the £3000, in favour of the trustees "and for the ends, uses, and purposes, expressed in a declaration of trusts," of even date therewith. The deed of declaration restricted the son's interest to an alimentary life-rent; and failing his issue, the fee was given to his aunt and her children. The son declared his acquiescence in the bond, and declaration of trusts, which were subsequently delivered to the trustees, who paid the income of the £3000 to the son.

After the father's death, the son married; and subsequently died, survived by his widow, but without issue. He left a deed by which he revoked the destination in the declaration of trusts in favour of his aunt and her children, and bequeathed the £3000 to his widow.

Held, affirming the decision of the Court below, that the deed of revocation was effectual, the destination in favour of the aunt and her children being purely of a testamentary nature; and that no *jus quæsitum tertio* had been created.

Per LORD SELBORNE:—The son could not possibly be bound by any erroneous interpretation which the trust deed might have put upon the original contract, so as to substantially vary its operation and effect, either on the principle of estoppel, or any other, unless there were some new bargain, or new consideration.

APPEAL from an interlocutor of the Second Division of the Court of Session. Mr. *John Costine*, senior, resolved to disentail his estate of *Glensone* in the stewartry of *Kirkcudbright*. His eldest son, *John*, the heir of entail, consented to the disentail in consideration of the payment by his father to him of £7000. Of

this sum £4000 was to be paid direct to *John* himself, and £3000 to trustees for his behoof. It is regarding the ultimate destination of the £3000 that the question in the present case arose.

The minute of agreement between the father and the son was dated the 20th of October, 1870, and bore that *John Costine*, junior, had agreed to a disentail on the following terms: First, *John Costine*, senior, bound and obliged himself to pay to *John Costine*, junior, the sum of £4000, to be secured by bond and disposition over the said lands of *Glensone*, to be executed immediately on the authority to disentail being granted by the Court. Second, *John Costine*, senior, bound himself at the first term of Whitsunday or Martinmas after the disentail had been completed, to pay to *Robert Swan*, and three others named, "or the survivor of them, the further sum of £3000 sterling, to be held by them in trust for the use and behoof of the said *John Costine*, junior; but it shall be lawful for the said *John Costine*, senior, to limit the power and control of the said *John Costine*, junior, over the said sum to such extent, and in such way and manner as he shall think proper; and in particular it shall be in the power of the said *John Costine*, senior, to direct the said trustees to hold the said sum of £3000 for behoof of the said *John Costine*, junior, in liferent only, and for the issue of his body in fee, whom failing, to his nearest heirs or assignees; and it shall also be in the power of the said *John Costine*, senior, to limit the interest of the said *John Costine*, junior, in the said sum of £3000, to that of a liferent alimentary provision, which he shall have no power to assign, and which shall not be liable to be attached by the diligence of his creditors." And the said *John Costine*, senior, binds himself to grant to the trustees a bond and disposition in security over the estate of *Glensone*, for the sum of £3000. And then, by clause fourth, the said *John Costine*, junior, accepts of the provisions in his favour above written as full satisfaction and compensation for giving his consent to the disentail of the said estate.

On the 26th of December, 1870, the prayer of the petition for disentail was granted by the Court of Session, and duly recorded. On the 31st of January, 1871, Mr. *John Costine*, senior, in settlement of his obligations to pay the two sums fixed by the agree-

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ment of the 20th of October, 1870, executed, first, a bond and disposition in security for the £4000 in favour of *John Costine* junior; and second, a bond and disposition over the estate of *Glensone*, for the £3000 in favour of *Robert Swan* and the other trustees for behoof of *John Costine*, junior. Then followed, *inter alia*, this clause, "but it is hereby provided and declared that these presents are granted by me (*John Costine*, senior), in trust only, and for the ends, uses, and purposes, expressed in a deed of declaration of trusts executed by me of even date herewith." And then came this declaration by the son. "And I, the said *John Costine*, junior, hereby declare my concurrence and acquiescence in the above-written bond and disposition in security, and in the said deed of declaration of trusts, which is also subscribed by me of even date herewith, and we consent to registration for preservation and execution." This bond was signed by both father and son, and registered on behalf of the trustees in the register of sasines on the 3rd of February, 1871.

The deed of declaration of trusts referred to above, after reciting the resolution to disentail, the agreement thereto of the son, and the appointment of trustees to hold the said sum of £3000 for the ends, uses, and purposes after mentioned, *John Costine*, senior, declared:—

"First, That they (the trustees) shall invest the said sum in their own names, as trustees foresaid, and pay the interest or annual produce thereof to the said *John Costine*, junior, during his life, at such times, and in such sums as they may think proper; and in virtue of the power reserved to me by the said minute of agreement, I hereby declare the said interest or annual produce to be a liferent alimentary provision in favour of the said *John Costine*, junior, which shall not be assignable by him, nor affectable by his debts or deeds, nor subject to the diligence of his creditors. Second, That upon the death of my said son, the said trustees shall hold the said principal sum in trust for behoof of the lawful issue of my said son and the heirs of their respective bodies, and shall pay and divide the said sum equally among them and the survivors of them *per stirpes* . . . . Third, In the event of my said son dying without leaving lawful issue, or upon the failure of such issue, the said trustees shall hold the said sum of £3000,

or the balance thereof, if any part shall have been paid to or on account of the issue of my said son, in trust for behoof of my sister *Isabella Costine* or *Wightman* . . . . and for behoof of her lawful issue," &c. Then followed the consent of *John Costine*, junior:—"And I, the said *John Costine*, junior, hereby declare my acquiescence and concurrence in all the provisions herein contained; and we consent to the registration hereof for preservation," &c.

Also, on the 31st of January, 1871, *John Costine*, junior, executed a deed of discharge; whereby, after reciting the terms of the agreement, and that his father had granted the bond and disposition of security for the purposes set forth in the deed of declaration of trusts, he exonerated and acquitted and *simpliciter* discharged the said *John Costine*, senior, his heirs, executors, and representatives whomsoever of, *inter alia*, the said sum of £3000 and of the whole obligations undertaken in the minute of agreement. The lands and estate of *Glensone* were sold at Whitsuntide, 1871, and the £3000 paid to the trustees, who thereafter paid the income to *John Costine*, junior, in accordance with the deed of declaration of trusts which had been delivered to them. At the date of these transactions *John Costine*, junior, was unmarried. His father died in August, 1871; and in January, 1874, *John Costine*, junior, was married to the Respondent, then Miss *Katherine Hay Crichton*. He died on the 17th of March, 1877, survived by the Respondent, but without issue. On the 4th of March, 1877, he executed a deed by which he revoked the destination in favour of his aunt and her children, the Appellants in the declaration of trusts, and bequeathed to the Respondent the £3000.

The deed of revocation after reciting the resolution to disentail, ran as follows:

And considering that my consent was given to the disentail of the said lands in consideration of my father undertaking to make payment to me, or for my behoof, of the sum of £7000; and an agreement to that effect was entered into between us, dated 17th and 20th days of October, 1870; and considering that I received from my father £4000 in part payment of said sum, and that at the request of my said father I consented to the remaining sum of £3000 being invested in trustees for my behoof, which was done by my father executing a bond and disposition in security for the said sum of £3000 over the said lands of *Glensone*, in favour of *Robert Swan*, of *Brae*, in the parish of *Lochrutton*; *James*

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Millar, &c. . . . ., and considering that the said sum of £3000 was my own money, and that I am entitled to revoke the conveyance thereof in trust to the persons before named; and considering that I have married since the execution of the said bond and disposition in security, and relative deed of declaration of trusts, and that it is now my desire to bestow the said sum of £3000 upon *Katherine Hay Crichton* or *Costine*, my wife, in the event of my death: Therefore I do hereby revoke and recall the said deed of declaration of trusts, and all other deeds and writings whereby the said sum of £3000 is placed beyond my control, or destined after my death; and I leave and bequeath, assign and convey, to and in favour of my said wife, in the event of her surviving me, the said sum of £3000, and all deeds and writings whereby the same is vested in the trustees before named, or the survivors of them.

The minute of agreement, and the deed of declaration of trusts were recorded on the 10th of April, 1877, and the deed of revocation on the 13th of April of the same year; all being after the death of *John Costine*, junior.

On the death of her husband, Mrs. *Costine* claimed the £3000, contending that the consent of *John Costine*, junior, to the disentail was given on condition of his receiving out of the price of the sale of the estate of *Glensone* such sum as should be ascertained as the value of his interest, and that an actuary having been consulted the sum of £7000 was agreed upon as the price; that the £3000 was part of that sum, and had during his life always been treated by *John Costine*, junior, as his property; and that the deeds of 1871 having constituted a revocable disposal of the said sum by him, the destination in the declaration of trusts was effectually revoked by the deed of the 4th of March, 1877, in her favour.

Mrs. *Wightman* and her children also claimed the £3000, maintaining that the deed of *John Costine*, junior, of 1877 was invalid, and had no force or effect as a revocation of the declaration of trusts, and that, therefore, *John Costine*, junior, having died without lawful issue, the third purpose of the deed of declaration of trusts was now operative. The trustees having raised a multiplepoinding, the *fund in medio* being £3000 and accrued interest, the Lord Ordinary (1) pronounced an interlocutor in favour of the claim of Mrs. *Wightman* and children.

A reclaiming note having been presented to the Court of Session against this decision, the Second Division (Lord *Ormidale* dissenting), on the 19th of March, 1878, recalled the Lord Ordi-

(1) Lord *Curriehill*.

nary's interlocutor, and found Mrs. *Costine* alone entitled to the *fund in medio* (1).

On appeal,

Mr. *Benjamin*, Q.C., and Mr. *M'Clymont* (of the Scotch Bar) contended for the Appellants that the £3000 never was the property of *John Costine*, junior, and he had no right to or interest therein other than that conferred on him under the deed of agreement. The deed of trust had been executed by *John Costine*, senior, with the consent and acquiescence of *John Costine*, junior, expressly as an exercise of the power reserved to him under the agreement. The son was, therefore, debarred from revoking that deed, or challenging it as being not warranted or authorized by the minute of agreement. By the deeds executed in 1870–1 an onerous mutual contract or family arrangement *inter vivos* was constituted, which could not be altered by one of the parties without the consent of the other, and certainly not after the death of that other party. Also by the delivery of the deed of trusts to the trustees, and the registration of the bond in the register of sasines, a *jus quæsitum* was constituted in favour of the Appellants, which could not be revoked by *John Costine*, junior. Their further argument is fully commented on, and dealt with, in the opinions of the Law Peers. [They cited or relied on *Stair*, 1, 10, 5; *Bell's* Prin. sect. 64; *Erskine*, 1, 6, 29; *Kidd* v. *Kidd* (2); *Campbell* v. *Hogg* (3); *Downie* v. *Mackillop* (4); *M'Gowan* v. *Robb* (5); *Boyd* v. *Curdy* (6); *Gordon* v. *Dewar* (7); *Warnock* v. *Murdock* (8); *Gentle* v. *Aitken* (9); *Fletcher* v. *Fletcher* (10).] See also as to payment of legacy duty: *Advocate-General* v. *Trotter* (11); *Brown* v. *Advocate-General* (12); *Thompson* v. *Browne* (13).

(1) Court Sess. Cas. 4th Series, vol. v. p. 782.
(2) 10 Dec. 1863; Court Sess. Cas. 3rd Series, vol. ii. p. 227.
(3) 18 March, 1863; Court Sess. Cas. 3rd Series, vol. i. p. 647.
(4) 5 Dec. 1843; Court Sess. Cas. 2nd Series, vol. vi. p. 180.
(5) 14 Dec. 1862; Court Sess. Cas 3rd Series, vol. i. p. 141; 35 Scotc Jurist, 72.
(6) 1775; Morr. 15,946.
(7) 1771; Morr. 15,579.
(8) 1759; Morr. 7730.
(9) 23 June, 1826; Court Sess. Cas. 1st Series, vol. iv. p. 749.
(10) 4 Hare, 67.
(11) 12 Nov. 1847; Court Sess. Cas. 2nd Series, vol. x. p. 56.
(12) 1 Macq. 79.
(13) 3 My. & K. p. 32.

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The Lord Advocate (Right Hon. *W. Watson*) and Mr. *E. E. Kay*, Q.C., appeared for the Respondent, but were not called upon to address the House (1).

The following opinions were delivered by the Law Peers:—

EARL CAIRNS, L.C.:—

My Lords, an elaborate and lengthened argument has been presented to your Lordships in this case, ranging over a number of legal questions, as to which in the abstract there cannot, I think, be much doubt. But the first inquiry to be made, as it seems to me, is what exactly are the facts of the present case, and what was the position of the parties concerned. If your Lordships arrive, as I have no doubt you will, at a correct appreciation of those facts and of that position, you will not, I think, find much difficulty in determining what is the law to be applied to them.

Now, your Lordships have here the case of an owner of a Scotch entailed estate in possession. He was desirous of barring the entail, and for the purpose of effecting that object he had to obtain certain consents, and notably the consent of his eldest son. The obtaining of that consent became, as it was perfectly right it should become, a matter of bargain between him and his eldest son, and a bargain was ultimately struck for that purpose. The terms of that bargain are expressed in writing, and there can be no doubt or controversy as to this, that the terms must be extracted from the writing, and the writing appears to me reasonably plain as regards the construction of it. I will ask your Lordships' attention, therefore, in the first place, to what was the agreement which was arrived at between the father, *John Costine* the elder, and his son, *John Costine* the younger; and I will say at the outset, that, so far as I can understand these papers, that agreement is the only agreement that ever was arrived at between the parties. I find no trace of either father or son intending afterwards to alter the agreement. I find them nowhere coming

(1) They cited in their printed case, *Lang* v. *Brown*, 24 May, 1867, Court Sess. Cas. 3rd Series, vol. v. p. 789; *Mitchell* v. *Mitchell's Trus.*, 5 June, 1877, Ibid. 4th Series, vol. iv. p. 800. See also Shaw's Digest, vol. ii. p. 988; Bell's Lect. vol. i. p. 106, and vol. ii. p. 962, 963, 974.

together and entering into a new arrangement between them. Any new arrangement, if come to between them, would have been wholly without consideration. The consideration for this agreement was the disentailing of the estate; when that was accomplished any further agreement could only have been a gratuitous one; in point of fact, as it seems to me, no further agreement, no substituted agreement, ever was formed between the parties.

Now what was the agreement between the father and the son as expressed in the writing to which I have referred? The father was to pay for obtaining the consent of the son to the disentailing of the estate a sum of £7000, but that payment was to be made in two different sums. £4000 was to be paid or secured to the son absolutely and without any kind of qualification. The residue of the sum, £3000, was to be secured, and the security was to be in the names of trustees. A bond was to be given to the trustees for the sum, and the enjoyment by the son of that sum was to be qualified in the way I am now going to describe.

In the contract between the father and the son, which is the agreement of the 20th of October, 1870, it was provided as to this £3000, that it was to be held by the trustees. And the trusts which are mentioned of this £3000 are divided into three sentences, the first of which was to be, says the agreement, "in trust for the use and behoof of *John Costine*, junior;" and if it had stopped there, that simply would have been a declaration of unqualified proprietorship on the part of *John Costine*, junior, of the sum of £3000. But what follows qualifies this absolute proprietorship. The second clause is this: "It shall be lawful for said *John Costine*, senior, to limit the power and control of the said *John Costine*, junior, over the said sum to such extent and in such a way and manner as he shall think proper." Now if we stopped here at this second stage of the declaration of trust, your Lordships would have that which in its terms would be a complete repugnancy between these two sentences. You would have in the first sentence a declaration of absolute proprietorship in the son; you would have in the second a right in the father to take away and destroy that proprietorship. That could not have been the

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intention of the parties, and unless you were absolutely driven to that result, you would not so construe the instrument.

But the third clause of the trust entirely clears up what was doubtful or what was strange in the expression of the second, for the third continues thus: "And in particular it shall be in the power of the said *John Costine*, senior, to direct the said trustees to hold the said sum of £3000 for behoof of the said *John Costine*, junior, in life rent only, and for the issue of his body in fee, and" (passing over the next part) "it shall also be in the power of the said *John Costine*, senior, to limit the interest of the said *John Costine*, junior, in the said sum of £3000 to that of a life-rent alimentary provision, which he shall have no power to assign, and which shall not be liable to be attached by the diligence of his creditors." Your Lordships, therefore, have there an explanation of what was meant by giving to the father the faculty to limit the power and control of the son over this sum to such extent as he thought fit. It was a power which enabled him, continuing the proprietorship of the money for the benefit of the son, to limit and control the form of enjoyment by the son of that sum, so that he might secure the life interest himself, which he could not alienate, and so that the *corpus* of the property might be preserved for the benefit of his children.

But then there continues, although it is interjected between the two sentences which I have read, the ultimate destination of the fund, when this moulding of the enjoyment for the benefit of the son and his children was accomplished. The ultimate destination is this "whom failing" (that is, failing children) "to his nearest heirs or assignees," the ordinary words for representing the continuance in the son of the absolute right of property by a destination to his heirs or assignees. Your Lordships, therefore, have that which is an intelligent and consistent trust of the fund. It is to be the property of the son, but the father is to have the right of impressing upon it a trust giving the son a life interest and securing the *corpus* for his children; but, these objects being accomplished, the fund remains the fund of the son, as it was originally intended to be. I asked the learned counsel for the Appellants (Mr. *Benjamin*) if the question were to be decided upon

this deed, would he dispute that the ultimate destination which I have read was simply that which would express the absolute property of the son, and he very properly said in reply that he could not deny that it would be so.

Now, my Lords, I pause here for the purpose of pointing out to your Lordships that the mere reading of this trust disposes of an argument of Mr. *Benjamin's* which was very ably pressed upon your Lordships, namely that you have here something analogous to what might be termed a joint power in a father and son to declare a trust of this money or a power to the son with the consent of the father to dispose of the property. No doubt, as Mr. *Benjamin* said, if that were the proper construction of this instrument, and if after such a trust the joint power had once been exercised by the father and the son, or if the power had been exercised by the son with the consent of the father, that being the nature of the power, such an exercise of the power could not be revoked after the death of the father. But, my Lords, there is nothing here in the slightest degree analogous to a joint power or to a power to the son, to be exercised with the consent of the father, or a power to the father to be exercised with the consent of the son. Whatever right the father has is an absolute right in him alone; whatever he can do he can do without any concurrence of the son whatever; it is a right exclusively given to the father, so far as it is given at all. And whatever right the son has is the right of the son entirely independent of the father. There is no junction, no connection, between the two. There is nothing which the father and the son are obliged to concur in doing. Whatever either of them can do he can do separately and independently of the other. The father can mould the mode and the form of enjoyment of the property by the son to the extent which I have mentioned, and he can do that, without any concurrence on the part of the son. So far as the father does not do that, the property remains the absolute property of the son without any right in the father to control that absolute property.

Now, my Lords, that being the bargain between the parties, that being the trust which originally was declared of this sum of £3000 placed in the hands of these trustees, how is it that any question or confusion has arisen upon the subject? If it stood

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here, and nothing more had occurred, there could hardly have been an argument raised upon the question. The property would have been open to any fresh destination which the son might choose to give it, provided only that he did not interfere with what the father might do for the benefit of his issue and for the securing of the life-rent to himself. Now what took place afterwards was this; the estate was disentailed, and disentailed on the footing of this contract. The proper conveyancing deed to carry into effect what remained to be done had to be executed, and accordingly a bond and disposition in security by the father, *John Costine* the elder, provided that the bond and disposition of the estate to secure the £3000 was "granted in trust," "and for the ends, uses, and purposes expressed in a deed of declaration of trusts executed by me of even date herewith, and to which reference is hereby made." And then the son, *John Costine*, junior, declares his concurrence and acquiescence in the above written bond and disposition in security and in the said deed of declaration of trusts." Therefore we are referred to and we have to go to the declaration of trust.

Now the declaration of trust professes to be a "declaration of trust by *John Costine*, of *Glensone*, with the concurrence of *John Costine* junior, in favour of trustees." It recites the contract with regard to disentailing the estate, it recites the bond and disposition in security in favour of the trustees for the £3000. It declares that the trustees are to hold the £3000, in the first place to invest it in the way spoken of and to pay the life-rent to *John Costine* the younger, as an alimentary provision; and secondly, on the death of the son, the trustees are to hold the principal sum in trust for the issue of the son. And then the third is this: "In the event of my said son dying without leaving lawful issue, or upon the failure of such issue, the said trustees shall hold the said sum of £3000, or the balance thereof, if any part shall have been paid to or on account of the issue of my said son, in trust for behoof of my sister *Isabella Costine*, or *Wightman*, spouse of *Robert Wightman*, presently in *London*, in life-rent, for her life-rent use allenarly, free from" the *jus mariti* of her husband, and then for her issue, and the shares of the females are not to be subject to the *jus mariti* of their husbands.

Now, my Lords, stopping there, I have to observe that if this had been the deed of the father alone, executed without any concurrence on the part of the son, over and above the limitation of the life-rent or the limitation to the issue of the son, according to my construction of the contract between the father and the son, it would have been entirely beyond the power of the father to have made any ultimate destination of the £3000; he would have been disposing of property which was as completely foreign to his jurisdiction as any property could be. Therefore, from any power of the father, it appears to me, this destination could receive no assistance whatever; and there, I think, the learned Judges in the Court below seem all to have agreed.

But there follows a declaration by the son to this effect, at the end. "And I, the said *John Costine*, junior, hereby declare my acquiescence and concurrence in all the provisions herein contained; and we consent to registration hereof for preservation." Now, the only question which appears to me to raise any ground for argument is, what is the effect of the concurrence of *John Costine*, the son, in a deed of the character of that which I have read? My Lords, it does not appear, I may say in passing, whether the aunt of the son, Mrs. *Costine* or *Wightman*, at this time was or would have been his nearest heir or not. I do not assume that either one way or the other. He himself, we are told, was a young man, unmarried, about the age of twenty-five. He declares his concurrence in what his father had done. There is no appearance whatever of any agreement, any family arrangement, any new contract, between him and his father, and that observation seems to me to put an end to one part of the argument that there was here any *jus quæsitum* of third parties. That of course could only arise if there was some agreement between the father and son for the benefit of third parties, and I find no trace of anything of that sort. It was a question of how the father should execute a power or faculty given to him. If he executed it in a proper way, he required no consent or concurrence of anybody else; if he executed it in a way that was not within his power, we must find some trace of a fresh agreement if that is to be set up as a fresh settlement between the father and the son.

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Now it seems to me that what the son, looking at this deed, had before his mind, was this: he had, by virtue of the original contract between himself and his father, a complete power of disposing of this £3000, subject to the life interest in himself and to the interest to be secured for his children. He was an unmarried man, and at his age it might appear to him that that was a right which might never become one of much practical importance; but as it stood upon the original contract, the destination would have been to his heirs and assignees generally. It appears to me that in this deed he does nothing more than allow, for the time and provisionally, the nomination of assignees under his original right of property. That is an intelligible arrangement to be made. He knew the members of his family at the time, and he would naturally be perfectly prepared to permit the insertion of their names in place of the general destination which stood in the original contract. But I can find no trace here of his intending to do anything more than to allow the insertion of the particular names of members of his family, in place of the general destination in the original contract. That is only stating in other words that this was a revocable nomination of assignees, that it was, as one of the learned Judges calls it, testamentary in its nature, which is only another term for saying that it is revocable in its nature. I can find no trace of anything whatever done or said on the part of the son, which was intended to give this a different character, or to elevate it to the position of an agreement made between him and his father, for the benefit of those particular persons whose names were thus inserted in the declaration of trust.

My Lords, I therefore ask your Lordships to dispose of this case upon the explanation, which seems to me to be the sound and proper one, of these documents which I have endeavoured to give. That is the explanation which found favour with the majority of the Court of Session, and it seems to me entirely sufficient to uphold the judgment at which they have arrived. I will therefore move your Lordships that the appeal should be dismissed, and, as there is no agreement between the parties as to costs, it must be dismissed with costs in the usual way.

LORD HATHERLEY:—

My Lords, I am of the same opinion as that expressed by my noble and learned friend on the woolsack. I proceed entirely upon this ground. The instrument which must regulate the rights of the parties is the first instrument dated the 20th of October, 1870, which is an agreement stating upon what terms the son had come in and consented to the destruction of the estate tail of which the father was in possession.

My noble and learned friend on the woolsack has gone through that agreement with a view to shewing the position of the parties, and I shall not therefore cite the passages again. I will simply state that the son's consent was given upon a bond of £4000, unfettered by conditions, and upon a bond of £3000 which was fettered by the conditions contained in the deed. What were those conditions? In the first place, the sum of £3000 is to be held "in trust for the use and behoof of the said *John Costine*, junior," that is the son. That would have given him the absolute interest in it, but for the control vested by the subsequent words in the father. "It shall be lawful for the said *John Costine*, senior, to limit the power and control of the said *John Costine*, junior, over the said sum, to such extent and in such way and manner as he shall think proper." Therefore, the whole sum of £3000 placed in the hands of the trustees stood in this position, that the father had power to control it in this manner, that is to say, he could direct them to hold the £3000, for the behoof of his son, "in life-rent only and for the issue of his body in fee, whom failing to his nearest heirs or assignees." But there is not a single word in that agreement giving the father the power of destination over the sum, on his own authority. He could guard the son's interest, he could watch over those interests, he could take care in the first place, by reducing it to a life interest, that the son should not dispose as he (the father) might think unadvisedly of the capital. And besides having the power of saying that he should only have a life interest, he might further limit the interest to "a life-rent alimentary provision." That is a further restriction which the father might put upon the son's life-interest. But my Lords I look in vain in the instrument for

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anything whatever which approaches to a power or authority being vested in the father himself, to deal with the sum which he had parted with, and which he had handed over to the trustees, that sum being part of the consideration which the son had been paid for barring the entail, and which was the son's to all intents and purposes; for although the father might give directions as to the mode in which it should be enjoyed by the son, and might preserve it for his issue, he had no controlling power over the fund itself.

Mr. *Benjamin* felt the difficulty undoubtedly that arose upon the wording of the deed in the way of his argument as to the father having the power to do anything like what he has here done, and he adopted I think I may say the reasoning of Lord *Curriehill*, which puts the case as strongly as it can be put for the Appellants. He contended that an interpretation was put upon this agreement by a deed which was subsequently executed, and which asserted, as has been said on the part of the father, apparently by the exercise of the nomination of the aunt, a right to control the destination of the fund. Lord *Curriehill* puts the result of that with reference to the subsequent deed thus. He says: "These are questions which it might have been difficult to answer had the deed of declaration of trusts and the other deeds referred to in the interlocutor not been granted. But I think that by these deeds, and particularly by the deed of declaration of trusts, to which *John Costine*, junior, was a party and gave his full and deliberate consent, he and his father have virtually interpreted the second head of the minute of agreement as conferring upon or as reserving to the father full power, failing issue of his son, to deal with the fee of the £3000 as he should deem right (1)." Therefore, says Mr. *Benjamin*, it is in effect a power given to the father to deal with the fund, and that power he has exercised, and the son has not only not opposed his exercising that power, but has concurred in his so doing. If it was of any important use in this controversy, nothing short of this must be contended, that that enabled the father in effect to revoke the gift of £3000 in favour of the son, and to revoke it from his issue, and to say that

(1) Court Sess. Cas. 4th Series, vol. v. p. 786.

not only the life-rent but the capital itself shall be at the disposition of the father.

Now, my Lords, if there had been any great difficulty in the construction of that first part of the clause I have read as to the £3000, if there had been any question, looking to the framing of the deed itself, as to whether there was or was not in the deed a power conferred upon the father, I think it would at least not be increased by those deeds which were subsequently executed by the son, and which are viewed by Lord *Curriehill* as giving a meaning to the agreement which certainly on the face of them the words do not indicate. Regard being had to the position of the parties, they do not occasion in my mind any doubt or difficulty. Lord *Curriehill* looks upon them as a concurrence by the son, and a giving to the father that which he had not according to the interpretation of the words themselves in the original agreement which was entered into between the parties. I do not find any trace of such an intention. I do not find that the father and the son recited the agreement as being of a doubtful or ambiguous character, or recited that questions had arisen between the two, and therefore an arrangement had been come to between the father and the son that the interpretation should be such as, on the face of it, the words did not appear to bear. I find nothing of that sort. It only comes to this—there is a declaration of trusts which proceeds in consequence of the agreement; the father recites the declaration of trusts, and he says, "Considering that by minute of agreement, dated the 17th and 20th days of October, 1870, entered into between me on the one part and the said *John Costine*, junior, on the other part, I bound myself, in consideration of the said *John Costine*, junior, having consented to the said estate being disentailed, *inter alia*, to pay to certain trustees for his behoof, at the first term of Whitsunday or Martinmas that should happen after the said disentail had been completed, the sum of £3000 sterling." There is nothing there to say that there had been any difficulty or any ambiguity which occasioned the necessity for this deed of declaration of trusts. The deed is executed evidently for the purpose of carrying out that agreement which had been come to between the parties in 1870.

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I do not know why it was, or whether there was any special intention in the matter, but it does leave out the limitation after the failure of issue which is contained in the original agreement, "whom failing to him, and his nearest heirs or assignees." Those words are certainly omitted in the recital in the deed of declaration of trusts, but I do not think that anything turns upon that. It is rather singular that those words should have been omitted in the recital of the limitation; but be the reason what it may, I find nothing whatever that indicates that either the father or the son thought in the slightest degree of varying the agreement or of doing otherwise than carrying it into full effect.

And if the agreement was to be carried into full effect, then I think the case is clearly brought to what the Lord Justice Clerk and Lord *Gifford* consider the true construction of the whole agreement, namely, that the £3000 was the son's fund, given to him as part of the consideration for his agreeing with his father to bar the entail; it remains the fund of the son, subject only to such power and control as the father might have over it in the way of arresting alienations of a certain character, as to which nothing need be said, nothing of the kind took place; but the agreement did not give the father the power to dispose of the fund, nor does it appear to me that the son's concurrence in the subsequent deed is given for the purpose of enlarging the authority of the father, or of parting with the control over the fund to the father and enabling him to hand it over to the aunt. The effect of it appears to me to be simply this. The son had this control over the property guarded in the way I have indicated, and that son said (this is the legal effect of it in my mind), that out of his moneys he was willing at that time that the capital at his death should pass over to the person indicated in the deed. But then, as regards that, it was entirely a voluntary disposition; there was no bargain between the father and the son that that should be the case. They having previously agreed to bar the entail, there was no new bargain entered into at that time of this kind:—"You shall also agree with me to give a certain sum of money in this way." If it had been so, the cases which have been cited might have had some application, but that was not the case. I do not see that

they intended to agree to anything of the kind in 1871. I think that the deed of declaration of trusts left the parties in exactly the position in which the original agreement left them, and that left the property in trust for the use and behoof of the son, which he was at that time minded to dispose of in a certain way; but the deed being entirely without onerous consideration, it left him full power to dispose of the property by a testamentary act afterwards, and that power he exercised by testamentary disposition.

LORD SELBORNE :—

My Lords, the recital of the agreement between the father and the son, in this deed of trust, is imperfect, and might, not impossibly, be misleading. If the agreement had been in those terms, and in those only, it would (according to the opinions of the Lord Ordinary and Lord *Ormidale*), have justified the father in dictating, at his own mere will and pleasure, the succession to this sum of £3000 after the son's death. But that sum really belonged to the son absolutely, and would necessarily be part of his *post mortem* succession (failing his issue) after his death; and the father's power of control really extended no farther than to the restriction of the manner in which the son's life interest was to be enjoyed, and to securing the succession of his issue, if issue he should have.

When the deed of trust was executed there was no new bargain, and no new consideration. The son could not possibly be bound by any erroneous interpretation which that deed might have put upon the original contract, so as substantially to vary its operation and effect, (if it ought to be so understood,) either on the principle of estoppel, or on any other; unless there were some new bargain or new consideration. That deed, in all its material provisions, was the deed of the father, speaking in the first person singular, and purported to operate by virtue of his power of control. There were no dispositive or conveying words on the part of the son; he merely acceded to the deed, and declared his acquiescence and concurrence. This could, at the utmost, amount to no more, than the expression of his will, at that time, that his *post mortem* succession, as to this fund, should go in the order and course declared by that deed. Such a mere expression of his will was, at the most, testamentary and revocable, and it was duly revoked.

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I agree, therefore, with the view of this case taken by the Lord Justice Clerk and Lord *Gifford;* and with the reasons for their decision, which are clearly and ably explained in Lord *Gifford's* judgment (1).

Interlocutors appealed against affirmed, and appeal dismissed, with costs.

Lords' Journals, March 20, 1879.

Agent for Appellants: *A. Beveridge.*
Agents for Respondent: *Simson, Wakeford, & Simson.*

(1) Court Sess. Cas. 4th Series, vol. v. p. 791.

[PRIVY COUNCIL.]

CHARLES HAMON . . . . . PLAINTIFF; P. C.*

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JOSUÉ JOSUÉ GEORGE FALLE . . . . DEFENDANT. *Feb.* 7, 8.

ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.

Action for Damages—Representation by Defendants to Plaintiff's Employer in good faith in the course of their Business.

Declaration, that the Plaintiff, a certificated master mariner, having been employed as master of certain vessels, his services were retained by the proprietor of ship *U.*; that he was getting ready to take command thereof when he found that the Defendant insurance society had intimated to the said proprietor that if the Plaintiff were to take command of her the society would refuse to continue to insure her; that he then took certain steps in order to induce the society to reconsider their resolution or to give him an opportunity of refuting the reasons they might have for it, but in vain; that by reason of this proceeding on the part of the society he had lost his employment, and that this arbitrary and vexatious conduct on the part of the society caused him considerable damage in depriving him of his employment, and consequently of the means of providing for and maintaining his family—praying that the conduct of the society might be declared illegal, arbitrary, and vexatious, and that they might pay damages £500.

Plea in effect that the Defendants acted upon information which they believed to be true that the Plaintiff was addicted to intemperance, that they communicated their refusal to insure, but not their information, to the Defendants, that they did so in good faith, and without any malice towards the Plaintiff, without any desire to injure him, and in the honest belief that the information they had received was sufficient to justify the course which they took:—

Held, that such defence (if proved) was a sufficient answer to the *primâ facie* cause of action disclosed by the declaration. The representation made by the Defendants was clearly one made in the conduct of their own affairs and in matters in which their own interest was concerned:

Held, further, that such defence was established by proof that the Defendants had received such information, and had reason to believe it to be true, without conclusively establishing habits of intemperance against the Plaintiff as upon a plea of justification.

APPEAL from a judgment of the Royal Court of the Island of *Jersey* (July 23, 1877).

* *Present*:—SIR JAMES W. COLVILE, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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The facts of the case and the pleadings sufficiently appear in the judgment of their Lordships.

Mr. *Pollard*, and Mr. *Channell*, for the Appellants.

Mr. *Benjamin*, Q.C., Mr. *Bompas*, Q.C., and Mr. *Petheram*, for the Respondent.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

The Plaintiff in this case is a master mariner holding a certificate from the Board of Trade. The Defendant was, when the action was brought, the president of the *Jersey Mutual Insurance Society for Shipping*, and is sued as the representative of that society. The society is, as its name imports, a mutual insurance society for shipping, and is governed by the rules which were put in as part of the evidence before the Court below, and are now before their Lordships. Some of those rules will have to be more particularly considered hereafter, but it is sufficient at present to state that the general course of business of the society seems to be that the different shipowners who become members of it underwrite each other's vessels in a certain proportion, and that the insurances effected are in the nature of time policies for one year.

The action is a peculiar one. The effect of the pleading in the nature of a declaration is as follows:—that the Plaintiff holding the position which has been already mentioned, and having been employed as master of certain specified vessels, and in particular of the *Dora*, which then belonged to the late M. *Félix Briard*, his services were retained by M. *James Sebire*, the proprietor of the ship *Ulysses;* that he was getting ready to take the command of that vessel when he found that the insurance society had intimated to M. *Sebire* that if the Plaintiff were to take command of her, the society would refuse to continue to insure her; that he then took certain steps in order to induce the society to reconsider their resolution, or to give him an opportunity of refuting the reasons they might have for it, but in vain; that by reason of this proceeding on the part of the society he had lost his employment,

and that this arbitrary and vexatious conduct on the part of the society caused him considerable damage in depriving him of his employment, and consequently of the means of providing for and maintaining his family. And he prayed that the conduct of the society might be declared illegal, arbitrary, and vexatious, and that they might pay the damages claimed to the amount of £500.

In the first instance, the society took the proceeding which is set out in the record, which is partly in the nature of a demurrer; but also sets forth the resolutions of the committee under which the telegrams which had passed between them and M. *Sebire* were sent, and which were in fact the cause of the Plaintiff's non-engagement as master of the vessel. The effect of this pleading was to submit that there was no ground of action. The Court, however, considering that the course adopted by the society had caused considerable damage to M. *Hamon* in preventing him from following his profession as a master mariner; that the resolutions of the committee produced by the Defendant contained no *motif* or reason to justify the proceeding which the committee had thought fit to adopt; and that such a proceeding, if adopted—"*sans cause ou raison valable*"—without cause or valid reason, would be an arbitrary and vexatious act, that would give a right of action to the person who was subject to it; decided that the society ought to suffer the consequences of its act, unless it furnished sufficient grounds or motives to justify its conduct. Leave was given to appeal to the full Court, the Court of greater number, but the Defendants have never availed themselves of that permission. Mr. *Benjamin* has, in argument, fairly admitted that the declaration must be taken to disclose a *primâ facie* cause of action; and that the only question is whether the plea or *prétention* which the Defendants filed under the last-mentioned order has been proved, and if proved constitutes a valid defence.

That *prétention* is to be found in the record. In substance it pleads that the committee of administration only took the course they did in consequence of the information which they had received from sources respectable in themselves and worthy of belief, and which in the opinion of the committee established that M. *Hamon* when in command of the ship *Dora*, belonging to

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Messrs. *Felix Briard & Co.*, had been guilty of and had given way to intemperance, and had conducted himself in such a way as not to deserve the confidence of his owners, who had dismissed him from their service; that in those circumstances, the committee not being able to have confidence in M. *Hamon*, and thinking that an insurance was a purely voluntary act on their part, had decided not to expose the society to the risk of becoming responsible for the fate of a ship which would be placed under the command of a man whom they had reason to believe was addicted to a vice criminal in any case, but still more so in the case of a man holding the position of master of a vessel; that having taken that determination, the committee confined themselves to communicating to M. *Sebire*, without letting him know in terms the information which they had received on the subject of M. *Hamon*, whom, so long as they could protect the interests of the society, they had no desire to injure. It further states that in support of their *prétention* the Defendants produced the letter from M. *Briard*, which is to be found in the evidence, and which they say was brought by M. *Hamon* to the office of the society only a few days before the date of the correspondence between M. *Sebire* and the committee, and they contend that that letter alone justifies fully the conduct of the society against *Hamon*, and that it was of a kind and of a nature to inspire doubt with reference to him and distrust of him, and that they cannot be bound to furnish legal proof of the conduct of *Hamon* whilst he had the command of the vessel *Dora*, but that it sufficed that they should have reasonable grounds for refusing to place their interest at the risk of the conduct or acts of *Hamon*.

The effect of the defence thus pleaded is clearly that the Defendants acted in good faith and without any malice towards the Plaintiff, without any desire to injure him, and in the honest belief that the information they had received was sufficient to justify the course which they took. Their Lordships are of opinion that such a defence, if proved, is a sufficient answer to the *primâ facie* cause of action disclosed by the declaration. The finding of the Court that the act of the Defendants would be arbitrary and vexatious, and that the Defendants would be liable for damages unless they could shew sufficient motives to justify what they did,

points to that conclusion. Their Lordships further think that if the case is to be likened (as in the argument it has been) to an action for defamation it would fall within the rule thus laid down by Mr. Baron *Parke* in the case of *Toogood* v. *Spyring* (1): "In general an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned." In the present case their Lordships think that the representation made by the society to *Sebire* was clearly one made in the conduct of its own affairs, and in matters in which their own interest was concerned.

It was argued, however, that the Defendants were not entitled to the benefit of this rule by reason of their non-observance of the rules by which the society is governed. The objection founded on the non-observance of the rules may be taken to be either that those rules created a positive duty on the part of the Defendants towards the Plaintiff, of which the non-observance of the rules was a breach, which in itself constituted a cause of action; or that the non-observance of the rules, and therefore the irregularity of the proceedings adopted by the society, were evidence of actual malice sufficient to deprive the Defendants of any defence which they might have on the ground of privilege.

It will be convenient now to deal with the question which has been thus raised upon the rules in either form. In their Lordships' opinion it is impossible to treat these rules as constituting anything in the nature of a contract between the society and the Plaintiff, or as imposing upon them in the actual circumstances of the case any positive duty towards him. If, therefore, what the Defendants did was not otherwise actionable, a departure from the rules, even if the case were within them, unless shewn to be malicious, would not make it actionable.

They do not, however, think that in this case the non-observance of the rules has been established. Those that are chiefly relied upon are the 53rd and the 37th in the earlier edition of the

(1) 1 C. M. & R. 193.

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rules. The 53rd is: "That the owners of vessels insured in this society are hereby required, when they appoint masters to the command of their vessels, to give notice thereof in writing to the secretary within forty-eight hours, under a penalty of 1*s.* per cent. on the amount insured on said vessel." It is said that *Sebire's* notice that he was about to put the Plaintiff in command of his vessel was given under this rule, and that that necessarily implied that the appointment had been actually made, a fact which would bring the master within the operation of the other rule. Their Lordships are not prepared to put that construction upon the 53rd rule. They think that it may very well be taken to mean that when the owners, as in this case, are about to appoint a new master to the command of their vessel, they are to give notice of it to the secretary with a view to any objection being made by the society which it might be competent for them to make; and that even if the rule be taken to apply only to an actual appointment, the evidence fails to shew that in this case there had been an actual and complete appointment of the Plaintiff as master of the *Ulysses*, which on that construction of the rule would bring him within it. Again, whatever may be the construction to be put upon the 53rd rule, their Lordships do not think that in this case the master can in any way be brought within the operation of the 37th rule so as to make it imperative upon the society to proceed under its provisions. That rule says:—"That masters who by habitual intemperance may endanger the lives or property under their charge, shall also be considered unfit to command any vessel insured in this society; and whenever such cases are reported, and after due inquiry found correct, they will be submitted to a full committee who will have power to dismiss or suspend any master so addicted for no less a period than six months after his arrival in a port of discharge in the *United Kingdom;* and no master dismissed shall continue to sail in any vessel in this society during the period of such suspension in any capacity whatever." No doubt if a master has been actually appointed to a vessel, and the society seeks to subject him to the consequences, either of absolute dismissal or of suspension for a period of not less than six months, so as to make it impossible for him to continue to sail in any vessel insured by the society during the period of suspension

in any capacity whatever,—if they proceed against him with the view of affecting him with these penal consequences, the rule may be applicable. But in this case they did not act or profess to act under this rule, and supposing that what they have done in this case be justifiable but for the rule, the non-observance of the rule does not appear to their Lordships in any degree to make it the less justifiable; or to afford any proof, or indeed evidence of actual malice in the transaction.

Their Lordships having stated their view of the issue which went down to the principal Court to be tried between the parties, have now to consider whether that Court was justified in finding that the plea or *prétention* was substantially proved. In their Lordships' opinion it is in substance proved by the evidence of M. *Briard* alone. It appears clear by the evidence of that witness, who must be assumed to have been called by the Plaintiff, since his examination in chief is by the Plaintiff, that there had been some reports of intemperance which led to the inquiry to which M. *Briard* deposes as having taken place on the arrival of the vessel at *Liverpool*. M. *Briard* states that he examined all the crew on that occasion, and that all except one supported the charges of drunkenness, both in *Java* and on the voyage between *Java* and the *Cape of Good Hope* or *St. Helena*. There seems to have been no suggestion of intemperance after *St. Helena*. M. *Briard's* evidence seems also to support the allegation that in consequence of that inquiry M. *Hamon* did cease to be master of the vessel; and it appears further by a letter of M. *Briard*, the contents of which seem upon the evidence to have been known to the Plaintiff, that he remained out of employment from that time up to the date of the letter. These circumstances were given in evidence to shew that M. *Briard* had grounds for the statements he made to the society, though the more material question is, whether the company *bonâ fide* believed on reasonable grounds the truth of those statements. M. *Briard's* letter seems to have been written under these circumstances: when M. *Sebire's* letter of the 22nd of September came to the society, stating, as they say, that he was about to appoint the Plaintiff to the command of the *Ulysses*, they telegraphed to M. *Sebire* the first resolution of the committee objecting to the appointment; but it

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appears that before that there had been a verbal communication between the secretary of the society and M. *Briard*. That was on Friday, the 25th. On the following Monday the Plaintiff applied to M. *Briard* evidently with the intention to get him to say what he could for him, and M. *Briard* then wrote: "Captain *Hamon* has just applied to me for a reference in writing respecting his conduct whilst in charge of the *Dora*. I can only repeat what I stated to Mr. *Neel*, the secretary, last Friday, that he had indulged in intoxicating liquors whilst at *Java* and on the homeward passage, but that after passing the *Cape* he had all liquor thrown overboard. He has never met with any accident to a vessel under his command that I am aware of, and I think the time he has been out of employment will have been a lesson to him for the future." M. *Briard* seems to have written with the intention of doing the best he could for the Plaintiff in order to get the committee to reconsider their resolution of the 25th of September. It is not very clearly proved when that letter came before the committee, or whether it was before them when they came to the resolution of the same date, Monday, the 28th, refusing to alter the former resolution; but that circumstance is not, in their Lordships' view, very material to the issue whether the Defendants have established the broad ground that they did act *bonâ fide* and upon information previously received which they had reason to believe to be true. Certainly the letter, if it had been before them, would not have qualified that belief, because it contains an admission of the supposed intoxication on the voyage home; whilst it puts to the committee that M. *Hamon* having been so long out of employment, might reasonably be supposed to have resolved to conduct himself better for the future.

Their Lordships being of opinion that the evidence of M. *Briard* alone is sufficient to establish the substantial part of the plea, and to support the finding of the Court, are glad to feel themselves relieved from the necessity of expressing any opinion whether the charge of intoxication, upon which there is conflicting evidence has been actually and in point of fact brought home to the Plaintiff; nor do they understand that the Court of *Jersey* has found more than that the Defendants had established that they had sufficient motives and reasons to justify their conduct, such

motives and reasons being the information they had received, and a *bonâ fide* belief in the truth of it. Such a finding is obviously far less prejudicial to M. *Hamon's* character than one that the habits of intemperance imputed to him had been completely and conclusively established against him as upon a plea of justification. On the other hand, this consideration is sufficient to dispose of the applications which have been made to their Lordships to grant further inquiry. The question to be tried was, whether the Defendants were justified in what they did, and that question has on sufficient evidence been determined in their favour. Their Lordships would not be justified in reopening the case upon any of the grounds which have been taken by the Plaintiff, in order to try at the expense of the Defendants a question which is not strictly relevant to the real issue between the parties.

Their Lordships must advise Her Majesty to dismiss the appeal, and to affirm the judgment of the *Jersey* Court. The Plaintiff having been admitted to appeal *in formâ pauperis*, there will of course be no order as to costs.

Solicitor for the Appellant: *John Rae.*

Solicitors for the Respondent: *Saunders, Hawksford, & Bennett.*

[PRIVY COUNCIL.]

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THE BOROUGH OF BATHURST . . . DEFENDANTS;

AND

WILLIAM MACPHERSON . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Nuisance in the Highway—Special Damage—Whether Municipality liable for Non-repair of Roads and Drains—New South Wales Acts, No. 13 *of* 1858 *and No.* 12 *of* 1867.

The municipality of *B.*, incorporated under *New South Wales* Acts No. 13 of 1858 and No. 12 of 1867, and having thereunder the care, construction, and management of the roads and streets within their municipality, constructed therein a barrel drain into which ran an open drain, the brickwork of which having broken away, and not having been repaired, a hole was caused, into which the Plaintiff's horse fell, carrying the Plaintiff with him, crushing the Plaintiff's leg against one side of the hole, and causing a compound fracture of the leg.

In an action claiming damages against the municipality (*a*) for negligence in constructing the street, (*b*) for negligence in keeping and maintaining the street, and not repairing the drain, gutter, or sewer in the said street (plea, the general issue) the Chief Justice directed the jury that the Defendants under their Act of incorporation were not liable for the result of any mere nonfeasance; that if they thought fit to construct a sewer, and did the work in so negligent a manner as to bring about the accident, they were liable for that misfeasance; but if they constructed the sewer properly in the first instance and it became defective afterwards they were not bound to repair it; and further, that if the defective state in which the drain was arose from the operation of the weather or wear and tear, it having been properly constructed originally, they were not liable. Verdict for Defendants:—

Held, on motion for a new trial, that as regards (*b*) there was misdirection. The barrel drain was not only made by the Defendants, but the sole control and management of it were by the statute vested in them. By reason of their construction of that drain and their neglect to repair it, whereby, as an indirect but natural consequence the dangerous hole was formed, which was left open and unfenced, they caused a nuisance in the highway for which, whatever their statutory obligation to repair may have been, they were liable to an indictment, and also to an action by the Plaintiff who had sustained direct and particular damage from their breach of duty.

APPEAL from an order of the Supreme Court (June 29, 1877) making absolute with costs a rule for a new trial.

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

The Respondent sued the Appellants, as appeared by the declaration filed on the 19th of December, 1876, on two grounds, the first count of his declaration in effect alleging that in consequence of the negligence of the Appellants in and about the care, construction, and management of certain streets (to wit) *Durham* and *Hope Streets*, in the borough of *Bathurst*, of which streets the Appellants had had the care, construction, and management, and also in the making of a certain drain in and along the said streets, and in allowing and suffering the same to be in a condition dangerous to persons lawfully passing over or along the said streets, whereby the Respondent whilst lawfully passing over and along the said streets received injuries; and the second count of the said declaclaration alleging in effect that in consequence of the Appellants negligently managing and continuing the said drain along the said streets, and neglecting to repair the said drain, the same became and was dangerous to persons lawfully passing over and along the said streets, whereby the Respondent whilst lawfully passing as aforesaid received injuries. To this declaration the Appellants pleaded not guilty, and issue was joined.

The facts and the direction of the Chief Justice to the jury at the trial appear in the judgment of their Lordships.

The jury found a verdict for the Appellants.

On the 4th of June, 1877, a rule *nisi* was granted calling upon the Appellants to shew cause "why the verdict should not be set aside, and a new trial granted, on the ground that the ruling and direction of His Honour the Chief Justice, that the Plaintiff could not recover on the ground that the Appellants were not bound to repair or keep in repair, was erroneous."

The rule *nisi* was made absolute with costs by order of the Supreme Court (*Hargrave* and Sir *W. Manning*, JJ., *Martin*, C.J., dissenting).

The Chief Justice was of opinion that at common law no liability was cast upon municipalities to keep in repair public roads and drains within the boundaries; that the law of *New South Wales* governing the question was the 117th section of the *Municipalities Act*, the words of which are "that the Council shall within the boundaries of the municipality have the care, construction, and management of public roads;" and that those

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words created no obligation upon the municipality to keep such roads in repair, but merely appoint the Council the persons to exercise any care over the roads that may be exercised. The other two learned Judges were of a contrary opinion, holding that the words of the 117th section, and of the other sections of the Act, did cast a duty upon the Council to keep the roads within the boundaries of the municipality in such a condition of repair as to prevent danger to the lives and limbs of passers-by.

Mr. *Benjamin*, Q.C., and Mr. *Boddam*, for the Appellants:—

The borough may have been liable to an indictment in this case, but that is the only remedy, unless another has been specially created by the Acts of 1858 and 1867. At common law there is no liability for nonfeasance, only for misfeasance. The principle upon which that distinction rests is that, while at common law everybody is liable to an indictment for a nuisance, he is not liable for nonfeasance unless a statutory duty to do a thing is shewn, and then the nonfeasance becomes a statutory misdemeanour, and does not involve liability at common law. Here the Act of 1867 gave the municipality power to levy rates, but it did not impose a duty to repair the streets, or roads, or drains.

Reference was made to *Russell* v. *The Men of Devon* (1), where it was held that no action would lie against the inhabitants of a county or parish for breach of a public duty, because they were not a corporation; to *Harris and Wife* v. *Baker* (2), where it was held that there was no liability on the part of trustees of a public road because of remoteness, a power moreover, having been conferred upon them by Act of Parliament, and not a duty imposed; to *Mackinnon* v. *Penson* (3), where it was held that inasmuch as the highway ought to be repaired by the public, an injury arising from that neglect cannot be the subject of an action, but is only ground for the Crown interfering. In that case also it was held that an action does not lie against a county surveyor for non-repair under a statute which enables a county to sue and be sued in the name of the surveyor. See also *Metcalfe* v.

(1) 2 T. R. 667.
(2) 4 M. & S. 27.
(3) 8 Ex. 319; on appeal 9 Ex. 609; S. C. 22 L. J. Mag. Dec. 57; 23 L. J. Mag. Dec. 97.

Hetherington (1). An action for nonfeasance does not lie at common law against surveyors of highways; it must be given by statute: *Young* v. *Davies* (2). Nor against a metropolitan vestry: *Parsons* v. *Vestry of St. Matthew, Bethnal Green* (3); *Wilson* v. *Mayor and Corporation of Halifax* (4). Nor against a local board of health: *Gibson* v. *Mayor of Preston* (5). See also *Foreman* v. *Mayor of Canterbury* (6).

There was further no liability on the part of the Appellants. The *Municipalities Act* did not impose on them any duty to repair, and keep in repair all the streets in the borough. Such a duty, in order to give a right of action for the breach thereof, must be created by common law, or by statute, or by charter, which is a contract with the Crown: *Mayor and Burgesses of Lyme Regis* v. *Henley* (7); *Hartnall* v. *The Ryde Commissioners* (8); *Couch* v. *Steele* (9). Where a duty is created by statute, if there is a penalty attached, no action lies unless expressly given by the statute: *Atkinson* v. *Newcastle and Gateshead Waterworks Company* (10) Where a statute gives a power to do an act, and a power to raise tolls in order so to do, a duty arises to every individual from whom a toll is taken: *Winch* v. *Conservators of Thames* (11). A mere power to do an act is not sufficient to impose an obligation to do it and confer a right of action for breach thereof by a party injured. In this case there was no statutable or common law duty to repair, there was merely a power to levy rates, without any imperative duty to apply the funds when raised to any specified object.

Mr. *Willis*, Q.C., and Mr. *Thomas*, for the Respondent:—

The evidence established that the streets and drains in question were within the boundaries of the municipality; that the hole into which the Respondent fell was caused by the brickwork not

(1) 11 Ex. 257; 24 L. J. (Ex.) 314.
(2) 7 H. & N. 760; and in error 2 H. & C. 197.
(3) Law Rep. 3 C. P. 56.
(4) Law Rep. 3 Ex. 114.
(5) Law Rep. 5 Q. B. 218.
(6) Law Rep. 6 Q. B. 214.
(7) 8 Bli. (N.S.) 690; 3 B. & A. 77.
(8) 4 B. & S. 361; 33 L. J. (Q.B.) 39.
(9) 6 E. & B. 402; 23 L. J. (Q. B.) 121.
(10) Law Rep. 6 Ex. 404; on appeal, 2 Ex. D. 441.
(11) Law Rep. 7 C. P. 458; in error, Law Rep. 9 C. P. 378.

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being repaired, and the rain tearing away the soil in consequence; that the Appellants had suffered it to remain in a dangerous condition for two years; at the time of the accident there was neither light to warn nor railing to protect the Respondent from peril. The whole question is whether, under these circumstances, there was any breach of duty on the part of the Appellants for which an action will lie. It is submitted that under the Municipalities Acts of 1858 and 1867, the Appellants were bound to keep the roads and drains within their boundaries in such a condition as not to be dangerous to life and limb. There was a duty to all persons generally, and therefore the corporation could be indicted: *Mayor and Burgesses of Lyme Regis* v. *Henley* (1).

No doubt if a duty is created for the first time by an Act, and a remedy is given by that Act, the Plaintiff is confined to that remedy. But inasmuch as the obligation to repair roads and drains arises solely under the Act in question in this case, if neither an indictment nor an action lies it would be a mere matter of discretion in *New South Wales* whether the roads were kept in good and proper order or not, and there would be no method of enforcing it. See the Act of 1867, sects. 119, 123, and 164. The duty here is imposed by statute, for the benefit of all, and therefore the Respondent has a right of action unless taken away by statute: *Coe* v. *Wise* (2). No case goes to the length that where a duty is cast by statute on a man, an action does not lie for special damages for the breach thereof. See *Henley* v. *Mayor of Lyme Regis* (3). *Couch* v. *Steel* is distinguished from *Atkinson* v. *Newcastle and Gateshead Waterworks Company* (4). Reference was made to *McKinnon* v. *Penson* (5); *Mersey Docks Trustees* v. *Gibbs* (6); to Baron *Channell's* judgment in *Young* v. *Davies* (7); to *Parsons* v. *Bethnal Green Vestry* (8); *Gibson* v. *Mayor of Preston* (9); *Parnaby* v. *The Lancaster Canal Company* (10). By this statute no remedy was provided for the breach of the duty imposed, and no words shew an intention not to allow the common law remedy of

(1) 8 Bli. (N.S.) 690, at pp. 714, 715.
(2) 5 B. & S. 464.
(3) 5 Bing. 101; S. C. 3 B. & A. 92.
(4) 3 E. & B. 111.
(5) 8 Ex. 327; 9 Ex. 609.
(6) Law Rep. 1 H. L. 93.
(7) 7 H. & N. 760.
(8) Law Rep. 3 C. P. 60.
(9) Law Rep. 5 Q. B. 218.
(10) 11 Ad. & E. 229.

indictment. A right to a new trial arises because the Chief Justice ought to have left it to the jury whether there was not a misfeasance by the corporation. [SIR BARNES PEACOCK referred to *Barnes* v. *Ward* (1). SIR ROBERT P. COLLIER:—It is only necessary for you to say there was a duty to take such care of the roads as to afford security to life and limb to the public.] Reference was made to *Hardcastle* v. *South Yorkshire Railway and River Dun Company* (2); *Binks* v. *South Yorkshire Railway and River Dun Company* (3); *Cornwell* v. *Metropolitan Commissioners of Sewers* (4); *Hounsell* v. *Smyth* (5); *Whitehouse* v. *Fellowes* (6).

Mr. *Boddam* replied.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal by the Defendants from a decision of the Supreme Court of *New South Wales*, by which a verdict for the Defendants was set aside and a new trial granted in an action brought by the Respondent, who was the Plaintiff, to recover damages under the circumstances which will be hereafter pointed out.

By an Act of the Legislature for *New South Wales*, No. 12 of 1867, intituled "An Act to establish Municipalities," it was declared that the Defendants, the municipality of *Bathurst*, had been legally constituted and incorporated under the provisions of the *Municipalities Act* of 1858 thereinbefore repealed, and that, for the purposes of the said Act of 1867, they should remain and be legally constituted and incorporated, and should be and be designated a borough.

By sect. 117 of the Act, it was enacted that the council should, within the boundaries of the municipality, have the care, construction, and management of public roads other than the main roads of the colony, and of public streets, lanes, ferries, wharves, jetties, and public thoroughfares, except as thereinafter mentioned.

The Act gave powers to the council of any municipality to

(1) 9 C. B. 392.
(2) 4 H. & N. 67.
(3) 3 B. & S. 244.
(4) 10 Ex. 771.
(5) 7 C. B. (N.S.) 731.
(6) 10 C. B. (N.S.) 765.

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enter upon private lands under certain restrictions, to obtain materials for repairing roads, streets, &c. (sect. 119).

The council was empowered to make rates for, amongst other things, the repairs of the roads, &c., but such rates were not to exceed one shilling in the pound in the year upon the value of the rateable property to be assessed, as in the Act mentioned, sect. 164; and they were also authorized to levy tolls, &c., sect. 179.

Sections from 120 to 124 inclusive were also cited as bearing upon the question of the duties and liabilities of the corporation in respect of roads.

There is no dispute as to the facts, which are thus stated in the Appellants' own case:—

"The Plaintiff is a mining proprietor and commission agent, residing at *Hill End*, a town some distance from *Bathurst*. Between 2 and 3 A.M. on the morning of the 26th of March, 1876, the Plaintiff was riding on his way home from *Bathurst* down a street within the municipality of *Bathurst* called *Durham Street*, the morning being dark and showery. On arriving at that part of *Durham Street* which is intersected by *Hope Street*, the Plaintiff's horse fell into a hole and carried the Plaintiff with him, crushing the Plaintiff's leg against one side of the hole, and causing a compound fracture of his leg. This was the injury complained of.

"The place where the Plaintiff was injured is in the suburbs of *Bathurst*, on the outskirts of the town, but within the municipality. *Durham Street* was originally constructed by the Defendants, and, as constructed, was a well made street, a mile and a quarter long, and 99 feet broad, including the footpath. The roadway, exclusive of the footpath, is 75 feet wide. The end of *Durham Street* in which the hole was is not, and never was, kerbed or guttered, but the pathway is formed. The hole into which the Plaintiff's horse fell is an open drain, where the gutter should be, nearly perpendicular at the side of the pathway running down *Durham Street* to *Hope Street*, and emptying itself into a barrel drain underneath the latter street. The heading of the barrel drain is covered over. Fifty yards from *Hope Street*, at its commencement, the drain is 2 feet deep, but deepens as it approaches *Hope Street* till, at the intersection of the two streets, it is 4 feet deep. The drain is

5 feet wide, and is not fenced. The hole in question was caused by the brickwork of the drain having broken away, and, not having been repaired, the rain tore away the soil and caused the earth to work away." The barrel drain was constructed by the Appellants, and it was stated by one of the Plaintiff's witnesses that the hole had been for two years as deep as it was at the time of the accident.

The Plaintiff commenced his action against the Defendants in the Supreme Court of *New South Wales*, to recover damages against them for the injuries he had sustained. By the first count of his declaration he claimed damages for negligence in constructing the street, and, by the second count, for negligence in keeping and maintaining the street, and not repairing the drain, gutter, or sewer, in the said street. The Defendants pleaded to the whole of the declaration the general issue. The action came on for trial in *Sydney*, before the Chief Justice and a jury of four persons, on the 1st of May, 1877. At the trial evidence, both oral and documentary, was adduced by the Plaintiff in support of his case, and the above facts were proved. The Defendants put in no evidence. In his summing-up, the Chief Justice directed the jury that the Defendants, under their Act of Incorporation, were not liable for the result of any mere nonfeasance; that if they thought fit to construct a sewer, and did the work in so negligent a manner as to bring about the accident, they were liable for that misfeasance, but if they constructed the sewer properly in the first instance, and it became defective afterwards, they were not bound to repair it; and further, that if the defective state in which the drain was arose from the operation of the weather or wear and tear, it having been properly constructed originally, they were not liable. The jury thereupon returned a verdict for the Defendants. A rule *nisi* to set aside the verdict and for a new trial was granted by the said Supreme Court (consisting of the Chief Justice, Mr. Justice *Hargrave*, and Sir *William Manning*) on the following ground only, viz.:—

"That the ruling and direction of His Honour, the Chief Justice, that the Plaintiff could not recover on the second count, on the ground that the Defendants were not bound to repair or keep in repair was erroneous."

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No question therefore arises as to the first count.

On the 29th of June, 1877, the rule *nisi* was heard before the same learned Judges, and the following order was made (the Chief Justice dissenting):—

"It is ordered that the said rule be, and the same is hereby made absolute, and the verdict obtained herein set aside, and a new trial be had between the parties on all issues.

"And it is further ordered that the costs of the said Plaintiff of and occasioned by the application for such new trial after taxation, be paid by the above-named Defendants."

Against this order the appeal is brought.

The learned Chief Justice has stated his reasons very fully in support of his opinion that there were no grounds for making the rule absolute. After referring to his ruling at the trial, he adverted to the importance of the question raised. He said: "No doubt this case raises a point of extreme importance, not only to this borough but to all the boroughs now or hereafter incorporated under the same Act, viz., whether, whatever may be the state of the municipal funds, whatever the size of the municipalities (and some of these municipalities are very extensive), whatever may be the state of the streets when they are handed over, however much it may cost to put them in order, they are not liable at their peril to put them in a thorough state of repair, and to be sued by every person who may meet with any accident, however slight, through their neglect to repair.

"A municipality may have, as in this case, streets extending over seventy miles, and the rates may not return over £1000 a year (the amount of rates that can be imposed being limited), and yet, if the Plaintiff is right in his contention, it is bound with these limited means to put the whole of the streets in repair.

"I can see, if this action is decided against the Defendants, that it will require speedy legislation to prevent such bodies from being financially ruined by actions like the present."

Mr. Justice *Hargrave* considered that the corporation, as the only body authorized to meddle with the roads, were bound by the Act to repair them so long as they remained by their authority open to the public.

Sir *William Manning* did not think it necessary to inquire

broadly into the obligations of a municipality to make all repairs of streets or roads which the general convenience of the public might demand, but confined himself to the question which the facts of the case compelled him to decide.

With regard to the particular case it is clear that the hole was caused by an artificial work, viz., the barrel drain which was constructed by the Council, and that the accident would not have occurred if that drain had not been made, or if it had been kept in repair so as to prevent the soil adjacent to the excavation made for the barrel drain from washing into it, and forming the hole in question. If the excavation for the barrel drain had not been made, the soil which was removed would have formed a support for the adjacent soil and prevented it from being washed away so as to form the hole. The brickwork which formed the wall to the drain, so long as it was in repair, supported the adjacent soil and prevented it from being washed into the excavation.

This being the state of facts, their Lordships do not think it necessary to decide whether it was the intention of the Legislature to throw upon the municipality the obligation of keeping in general good repair the roads and streets placed under its management. The question upon these facts is, whether the municipality having constructed the barrel drain was not bound to keep it in a state of repair which would prevent its causing a dangerous hole to be formed in the highway. Having, under the statute, the care, construction, and management of the roads and streets, the construction of the barrel drain by the Appellants was lawful; and the care and management of the roads being vested in them, the drain was in their control, and they had full power to repair or otherwise deal with it. Their Lordships are of opinion that, under these circumstances, the duty was cast upon them of keeping the artificial work which they had created in such a state as to prevent its causing a danger to passengers on the highway which, but for such artificial construction, would not have existed, or, at the least, of protecting the public against the danger, when it arose, either by filling up the hole or fencing it. Supposing the top of the barrel drain across *Hope Street* had fallen in, leaving a dangerous hole in the middle of that street, it would surely have been the duty of the Appellants to take steps to prevent persons

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falling into the trench which they had originally dug; and there would seem to be no substantial difference in the liability between a hole which had been directly made by them, and one which is the indirect but natural consequence of the artificial work they had created and had not properly kept. In the case of *Whitehouse* v. *Fellowes* (1), which was an action against the trustees of a turnpike road, the Defendants had converted an open drain in the road into a covered one, the effect of which was that flood water would be thrown on the adjacent lands, unless certain catchpits which were, at the same time made to prevent this mischief, had been properly constructed and afterwards kept in proper order. The landowner having brought an action and recovered damages for the injury arising from an overflow, it was held that the learned Judge at the trial had rightly directed the jury to find for the Plaintiff if they thought the catchpits were insufficiently constructed, or were kept in an insufficient and improper manner. In that case the trustees were held liable for an injury which was the indirect but natural consequence of their own artificial work which they had not taken proper means to avert.

In a recent case of *White* v. *Hindley Local Board of Health* (2), the facts were these:—The Plaintiff was riding along a highway, under which was a sewer, his horse trod on a grid or grating put there to drain the surface water from the road into the sewer. The grid being in a defective state, for want of repair, gave way, and the horse's leg was injured. It was held that the Defendants were liable to the Plaintiff for the damage done to the horse. The Court, in sustaining the action, assumed that the placing of the grid over the opening of the sewer was done with two objects, the one to prevent the hole from being dangerous to those using the road, and the other to prevent stones and other matters from passing into the sewer; and without saying that the Defendants (the Local Board) would be liable as surveyors of highways, the Court held that as the sewers were vested in them, they were liable "at all events in their capacity of owners of the sewers."

In the present case the barrel drain, even if the property of it did not belong to the Appellants, was not only made by the Appellants, but the sole control and management of it were, by the

(1) 10 C. B. (N.S.) 731. (2) Law Rep. 10 Q. B. 219.

statute, vested in them; and in their Lordships' view these circumstances threw upon them a duty of a similar kind to that which was held to exist in the case just cited.

Their Lordships are therefore of opinion that the Appellants, by reason of the construction of the drain, and their neglect to repair it, whereby the dangerous hole was formed, which was left open and unfenced, caused a nuisance in the highway, for which they were liable to an indictment.

This being so, their Lordships are of opinion that the corporation are also liable to an action at the suit of any person who sustained a direct and particular damage from their breach of duty: *Henley* v. *Mayor and Burgesses of Lyme Regis* (1). In that case the rule was clearly laid down by Lord *Tenterden*. He said, "We think the obligation to repair the banks and sea-shores is one which concerns the public, in consequence of which an indictment might have been maintained against the Plaintiffs in error (*i.e.*, the Corporation, Defendants) for their general default; from whence it follows that an action on the case will lie against them for a direct and particular damage sustained by an individual, as in the case of a nuisance in a highway by a stranger digging a trench, &c., or by the act or default of a person bound to repair *ratione tenuræ*. An indictment may be sustained for the general injury to the public, and an action on the case for a special or particular injury to an individual."

The general rule was also enunciated by the Lord Chief Baron *Pollock*, in the case of *McKinnon* v. *Penson* (2). He said, "There is no doubt of the truth of the general rule that where an indictment can be maintained against an individual or corporation for something done to the general damage of the public, an action on the case can be maintained for a special damage thereby done to an individual, as in the case of a nuisance in the highway by a stranger digging a trench across it, or of the default of a person bound to repair *ratione tenuræ*."

In their Lordships' opinion there is no principle upon which a distinction in this respect between nonfeasance and misfeasance can be supported.

(1) 5 Bing. 101; S. C. in error, 3 B. & A. 77, and in the House of Lords, 8 Bli. (N.S.) 690.

(2) 8 Ex. 327.

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In the case above cited of *Henley* v. *Mayor of Lyme Regis* (1), Lord *Wynford*, then Chief Justice *Best*, with reference to the liability of the corporation for the non-repair of the sea-wall, said, "I take it to be perfectly clear that if a public officer abuses his office, either by an omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer. The instances of this are so numerous that it would be a waste of time to refer to them."

It is scarcely necessary to remark that where a duty is created, for the benefit of the public, by Act of Parliament, and a specific remedy is thereby provided for a breach of the duty, it must be a question of construction whether the specific remedy was intended to be substituted for or to be provided in addition to the common law remedy by an indictment for the public, or by action for an individual who sustains a special or particular injury: see the case of *Atkinson* v. *Newcastle Waterworks Company* (2).

The principal objection taken by the learned Chief Justice in *New South Wales*, and by the learned counsel for the Appellants here, to the maintenance of the action was founded upon the nature of the supposed obligation, viz., a liability to repair public roads, and upon the authority of the case of *Russell* v. *The Men of Devon* (3), and of some others *in pari materiâ*. In those cases the principal objection to the maintenance of the action was that the inhabitants of the county or parish, as the case might be, were not a corporation capable of being sued as such. There are no doubt *dicta* to the effect of the inconvenience that might result from the multiplicity of actions and increase of litigation, if it were held that every individual aggrieved by the non-repair of a public road might sue either the county or parish or individual members of it; but such inconvenience was never admitted as a reason why an action should not be maintainable.

Another class of cases relied upon consists of those in which (as in *McKinnon* v. *Penson*, above cited, *Harris* v. *Baker* (4), and *Parsons* v. *Vestry of St. Matthew, Bethnal Green* (5)), it was held that such an action could not be brought against a surveyor of

(1) 5 Bing. 107.
(2) 2 Ex. D. 441.
(3) 2 T. R. 667.
(4) 4 M. & S. 27.
(5) Law Rep. 3 C. P. 56.

highways appointed under the 43 Geo. 3, c. 59, or a vestry appointed under the *Metropolis Local Management Act*, 18 & 19 Vict. c. 120. But the ruling principle of all these last decisions seems to be that it was not the intention of the Legislature to create by the particular statute a new liability, but merely to transfer existing powers; and, consequently, that if an action would not lie against the county or parish, or other superior body, it would not lie against the surveyor, functionary, or other creature of that statute. Without going at length through the numerous cases that have been cited on either side, their Lordships think it sufficient to say that this municipality has original and not merely transferred powers, and therefore does not fall within the class of cases referred to. It more nearly resembles the public body held liable to an action in *Hartnall* v. *Ryde Commissioners* (1), a decision which has been recognised as sound law in several later cases. It was there held that the statute creating the Commissioners having expressly imposed upon them the obligation of repairing the roads, they were liable not only to be indicted for a breach of that duty, but to be sued by anybody who could shew that by reason of such breach of duty he had sustained particular and special damage. In their Lordships' opinion no substantial distinction can be taken between that case and the present, in which the duty for the reasons above stated has been found to exist, though not expressly imposed by statute.

For the above reasons their Lordships are of opinion that the majority of the Judges were correct in holding that the rule for a new trial ought to be made absolute. They will therefore humbly advise Her Majesty to affirm the order of the Court below, and to dismiss the appeal. The Appellants must pay the costs of the appeal.

The question whether it was the intention of the Legislature to throw upon the municipality the obligation to keep all the roads under the care and management of the council in a complete state of repair is, as remarked by the learned Chief Justice, one of extreme importance, not only to the borough of *Bathurst*, but to all the municipalities which now are, or hereafter may be incorporated by the same Act.

(1) 5 B. & S. 361.

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It will be very desirable, in their Lordships' opinion, that the attention of the Legislature should be drawn to the difference of opinion which exists as to the construction of the Act, with reference to the general liability to repair, in order that they may, if they deem it expedient, set the matter of their intention at rest for the future.

Solicitors for the Appellants: *Wilde, Berger, Moore, & Wilde.*
Solicitors for the Respondent: *Webster & Graham.*

[PRIVY COUNCIL.]

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BANK OF NEW SOUTH WALES . . . DEFENDANT;

AND

WILLIAM OWSTON . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF SOUTH WALES.

Principal and Agent—Authority of Bank Manager to prosecute on behalf of Bank must be proved, not presumed—Liability of Bank for Malicious Prosecution by its Manager—Appealable Sum includes Adjudged Interest on a Verdict.

6 QBD 188
11 QBD 81.

Although costs may not be added to the amount recovered in estimating the appealable sum, yet interest on a verdict, given by statute, payable from the time of obtaining such verdict until the time of entering up the judgment appealed from, and included in such judgment, is to be considered in estimating such appealable sum.

In an action for a malicious prosecution against an incorporated banking company the jury found that the same had been authorized on behalf of the bank by *W.*, the acting manager, and were directed by the Judge that it was to be inferred from *W.'s* position as manager that he had sufficient power under the circumstances for directing a prosecution.

A rule *nisi* to enter a nonsuit or for new trial was discharged:—

Held, on appeal, that assuming the prosecution to have been authorized by *W.*, the direction to the jury to the effect that it was to be inferred from *W.'s* position that he had authority to direct the prosecution was on the evidence incorrect.

The arrest, and still less the prosecution of offenders, is not within the

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* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

ordinary routine of banking business, and therefore not within the ordinary scope of a bank manager's authority. Evidence accordingly is required to shew that such arrest or prosecution is within the scope of the duties and class of acts such manager is authorized to perform. That authority may be general, or it may be special and derived from the exigency of the particular occasion on which it is exercised. In the former case it is enough to shew commonly that the agent was acting in what he did on behalf of the principal; but in the latter case evidence must be given of a state of facts which shews that such exigency is present, or from which it might reasonably be supposed to be present.

Rule made absolute for a new trial.

APPEAL from a judgment of the Supreme Court (*Hargrave* and *Manning*, JJ., *Martin*, C.J., dissenting), discharging a rule *nisi* obtained on the 6th of June, 1876, to set aside a verdict for the Respondent for £500 and costs, and enter a nonsuit, or for a new trial in an action brought by the Respondent against the Appellants for malicious prosecution.

The circumstances out of which the action arose are sufficiently stated in the judgment of their Lordships.

The action was brought on the 23rd of March, 1876, against the Appellants for having maliciously and without reasonable or probable cause procured the granting of the summons issued against the Respondent. It was tried before Mr. Justice *Manning*, and on the 15th of May, 1876, a verdict was found for the Respondent for £500 damages. The jury found specially that the proceedings were authorized by Mr. *Wilkinson* on behalf of the bank; and the learned Judge reserved leave to enter a nonsuit on the ground that an action for malicious prosecution is not maintainable against a corporation.

On the 6th of June, 1876, the Appellants obtained a rule *nisi* to enter a nonsuit pursuant to the leave reserved, or for a new trial on the following grounds:—

1. That his Honour, it is submitted, was in error in directing the jury that all the acts of the bank's solicitors (Messrs. *Allen, Bowden, & Allen*), or any of them or their clerks were, as regards the prosecution of the Plaintiff, in law the acts of the bank for which the bank was responsible, although the bank and its officers did not know of such acts or anything about them.

2. That his Honour, it is submitted, was in error in directing the jury that the acts of Mr. *Wilkinson*, the acting manager of

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the bank, were, as regards the said prosecution, the acts of the bank, for which the bank was responsible.

3. That the special finding of the jury (that Mr. *Wilkinson* authorized the prosecution) is against evidence, and it is submitted has no evidence whatever to support it.

4. That there was not evidence to allow of a jury finding that the prosecution of the Plaintiff was in fact or in law a prosecution by the bank, and that his Honour ought to have directed the jury that upon the evidence *Allen, Bowden, & Allen* alone were liable, and therefore the verdict, it is submitted, is against law.

The decision of *Manning*, J., at the close of the evidence that the prosecution had been without reasonable or probable cause was not questioned, neither was the finding of the jury as to the existence of malice.

As regards the point on which leave was reserved to enter a nonsuit, the Chief Justice held that "Malice being essentially a state of mind cannot be attributed to a corporation which has no mind." The other two Judges held that the existence of malice in the minds of the servants or agents of a corporation is sufficient, and referred to the fact that numerous actions have been brought in *England* against incorporated companies in which it was necessary to prove malice, where the objection that malice could not be attributed to a corporation had not been taken.

Upon the first ground for a new trial mentioned in the rule *nisi*, *Manning*, J., said: "There was a further question at the trial whether the bank might not have been liable in respect of the act of their solicitors independently of proof of express authority by the manager. Upon that point I told the jury that I had very great doubts; but I invited them to assume such liability subject to the opinion of the Court in banco, in order that there might be an assessment of damages contingent upon that opinion, but I also stated that this view of the case would become immaterial if they should find that the bank manager had given actual instructions for the prosecution. As they found that fact, and as the Court now upholds their finding, it has become unnecessary to discuss this part of my direction. Nor was the subject argued before us so as to demand a decision."

Upon the second ground mentioned in the rule *nisi* the Chief

Justice said: "Managers, acting managers, and clerks of a banking corporation cannot be presumed to be the agents for such corporations, except for the transaction of the ordinary business for which they were instituted, and criminal prosecutions constitute no portion of such business. For the apprehension of persons uttering forgeries and committing other criminal acts under the immediate observation of any clerk or servant of a bank, every such clerk or servant has, as one of the public, the power on his own responsibility to apprehend, or cause to be apprehended, the person so committing the offence. The corporation can only become responsible by a recognition of the act by its governing body at the least, or by an authority under its common seal." The other Judges held that a bank manager must necessarily have authority to take steps for the prosecution and apprehension of persons believed to have stolen the bank's property, as there would often not be time to obtain the authority of the directors for a prosecution.

As regards the third and fourth grounds for a new trial mentioned in the rule *nisi* the Chief Justice concurred with the other members of the Court in holding that there was evidence enough to warrant the jury in finding that the proceedings were not taken by *Allen, Bowden, & Allen* on their own motion, but were authorized by Mr. *Wilkinson*, acting in the capacity of manager.

Mr. *Benjamin*, Q.C., and Mr. *J. C. Mathew*, for the Appellants.

Mr. *McIntyre*, Q.C., and Mr. *J. D. Wood*, for the Respondent.

Mr. *Wood* submitted that as the verdict was for £500 and no more, the Supreme Court had no power, having regard to the Order in Council, of the 13th of November, 1850, to grant leave to appeal. In ascertaining the appealable amount, interest on the verdict is no more to be included in the calculation than costs are; and as regards costs see *Doorgadoss Chowdhry* v. *Ramanath Chowdhry* (1); *Gooroopershad Khoond* v. *Juggutchunder and another* (2). [SIR MONTAGUE E. SMITH:—That case shews that interest decreed may be added to the principal, not interest on

(1) 8 Moo. Ind. Ap. Ca. 262. (2) 8 Moo. Ind. Ap. Ca. 166.

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decree, and that would be sufficient in this case to make it appealable]. But see *Boswell* v. *Kilborn* (1); *Quebec Fire Assurance Company* v. *Anderson* (2). In the Colony of *Victoria* it has been held that interest is not to be considered in estimating the appealable amount (3).

The Appellants were not called upon.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

In this case an objection has been made to the leave granted by the Supreme Court of *New South Wales* to appeal to Her Majesty on the ground that the sum involved is below the appealable amount. By the Order in Council of the 13th of November, 1850, which regulates appeals from the Supreme Court of *New South Wales*, an appeal is given from any final judgment, decree, order, or sentence of the Supreme Court, subject to certain regulations and limitations, the first being that such judgment, decree, order, or sentence shall be given or pronounced for or in respect of any sum or matter at issue above the amount or value of £500 sterling.

In the present case the action was for malicious prosecution, and the damages were laid at £5000. On the trial the jury found a verdict for the Plaintiff, with £500 damages. A rule *nisi* was applied for to set aside that verdict, which was granted, but upon argument discharged by the Court. The rule was discharged on the 12th of March, 1877, and on the 30th final judgment was entered up as follows: "Judgment after verdict for the Plaintiff, damages £500; interest on the above amount from the date of verdict, 15th May, 1876, to date, £33 1*s.* 11*d.*; taxed costs, £317 12*s.* 10*d.*"

It is plain from previous decisions of this tribunal that the costs may not be added to the amount recovered in estimating the appealable sum; and it is now contended at the Bar that interest on the sum awarded by the verdict ought not to be added. Their

(1) 12 Moo. P. C. 467.
(2) 13 Moo. P. C. 477.
(3) *M'Swain* v. *M'Millan*, 4 Vict. L. Rep. (Law) 271.

Lordships, however, think that interest under the laws existing in *New South Wales* is to be considered in estimating the amount. Interest on a verdict is given by the statute, 24th of *Victoria*, No. VIII., the 1st section of which enacts that, "Every Plaintiff who shall hereafter obtain a verdict in an action in the Supreme Court, upon which he shall hereafter obtain judgment, shall be entitled to interest at the rate of eight per centum per annum on the amount of such verdict from the time of obtaining such verdict until the time of entering up judgment thereon, and the amount of such interest shall be included in the judgment." The interest, therefore, is payable upon the amount of the verdict from the time of obtaining it until the time of entering up the judgment. It is to be included in the judgment, and forms part of it.

What, then, is the sum "at issue," to use the words of the Order in Council, in the present appeal? The verdict is only a step towards the judgment. The sum cannot be recovered upon the verdict, but is recovered in execution upon the judgment. The foundation of the judgment is the verdict, and the rule that was obtained to set aside that verdict must be understood as involving the whole sum which the verdict would carry, and which would be included in the judgment. That sum is not the original sum only, but, by virtue of the statute, that sum and interest.

A similar question was before this tribunal in certain appeals from *India*, and the judgment given on it will be found in 8th *Moore*, Ind. App. Cas. The part which is material is at page 168. "Where the appeal is from the whole decree, and the decree has given an amount, including interest up to the date of the decree, which exceeds Rs.10,000, it is clear that the matter which is in dispute in the appeal must exceed the sum of Rs.10,000; for the question to be tried upon the appeal must be whether the decree is or is not right; that is to say, whether the decree has or has not properly ordered payment of a sum exceeding Rs.10,000. Where, therefore, at the date of the judgment the sum which is recoverable under the decree of the Sudder Court is an amount exceeding Rs.10,000, there, in their Lordships' judgment, the case clearly falls within the terms of the Order in Council." In the same judgment their Lordships state that they "must not, of

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course, be understood to intimate that the Sudder Courts ought to give leave to appeal in cases in which the specified amount of Rs. 10,000 can only be reached by the addition of interest subsequent to the decree." Here their Lordships think that the sum involved in the judgment appealed from does exceed, for the reasons they have stated, the sum of £500, and they are therefore of opinion that the appeal ought to proceed.

Mr. *Benjamin*, Q.C., and Mr. *Arbuthnot* (Mr. *J. C. Mathew* with them), for the Appellants:—

It is admitted that the Plaintiff in this case is entitled to damages, and that the prosecution was without reasonable and probable cause, and therefore malicious. And the point that an action will not lie against a corporation aggregate for malicious prosecution, is given up. It is contended that the Plaintiff has chosen a wrong Defendant, and that the bank had nothing whatever to do with the prosecution complained of. It is contended on the evidence, that the authority to the solicitors who prosecuted did not emanate, as alleged, from *Wilkinson*, the acting manager of the bank; otherwise, that it was not within the scope of his authority to give orders to that effect.

Upon this latter point it was submitted that where a particular power is vested in a company, and a particular officer is placed to carry out that power, the company is liable; but where it has not so placed a particular officer, a subordinate one cannot bind the company, which must be taken to have delegated the power exclusively to some special officer. See *Eastern Counties Railway Company and Richardson* v. *Broom* (1); *Roe* v. *Birkenhead, &c., Railway Company* (2). Then is it part of the ordinary authority of a manager to institute criminal prosecutions? See *Goff* v. *Great Northern Railway Company* (3), and *Walker* v. *South Eastern Railway Company* (4), where the subject is more fully discussed than in *Giles* v. *Taff Vale Railway Company* (5). In *Poulton* v. *London and South Western Railway Company* (6) the

(1) 6 Ex. 314.
(2) 7 Ex. 76.
(3) 3 E. & E. 672.
(4) Law Rep. 5 C. P. 640.
(5) 2 E. & B. 822.
(6) Law Rep. 2 Q. B. 534.

question was treated as one of evidence of implied authority on which the jury might found a verdict. Here the evidence was kept from the jury, and the Judge directed them that the acts of the manager were the acts of the bank. Reference was made to *Walker* v. *South Eastern Railway Company* (1); *Edwards* v. *London and North Western Railway Company* (2); *Allen* v. *London and South Western Railway Company* (3); *Moore* v. *Metropolitan Railway Company* (4): *Lord Bolingbroke* v. *Swindon Local Board* (5); *Green* v. *General Omnibus Company* (6).

Mr. *McIntyre*, Q.C., and Mr. *J. D. Wood*, for the Respondents:—

The Appellant corporation was expressly authorized by the Act under which it was incorporated, 14 Vict. 1850, s. 1 (see 4 Victorian Statutes (fo. ed.), p. 55), to institute criminal proceedings; otherwise it would possess such authority at common law. The question is whether such authority can only be exercised, as contended on the other side, by the general manager or the board of directors. [SIR ROBERT P. COLLIER:—In the absence of the deed of settlement we are without information as to the powers of the directors or of any of the officers of the corporation.] In the absence of the deed it must be assumed that there was no express provision relative to prosecutions. The practice of the bank must be taken as shewing the rules of the corporation. That juries may be presumed to be acquainted with the duties of certain officers, see *Giles* v. *Taff Vale Railway Company* (7), *per Platt*, B., approved by the full Court in *Moore* v. *Metropolitan Railway Company* (8), per *Blackburn*, J. [SIR BARNES PEACOCK referred to sect. 24 of 14 Vict. 1850, which says that the common seal of a corporation need not be used "for the appointment of an attorney or solicitor for the prosecution . . . of any . . . proceeding."] The case of *Eastern Counties Railway Company* v. *Broom* (9) is of very little authority against the Respondent: see *Goff* v. *Great Northern Railway Company* (10); *Edwards* v. *London and North Western Rail-*

(1) Law Rep. 5 C. P. 640.
(2) Ibid. 445.
(3) Law Rep. 6 Q. B. 65.
(4) Law Rep. 8 Q. B. 36.
(5) Law Rep. 9 C. P. 575.
(6) 7 C. B. (N.S.) 290.
(7) 2 E. & B. 822.
(8) Law Rep. 8 Q. B. 36.
(9) 6 Ex. 314.
(10) 3 E. & E. 672.

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way Company (1) was decided on the ground that the prosecution was instituted by a subordinate officer: see judgment of *Montague Smith*, J. *Allen* v. *London and South Western Railway Company* (2) was decided on the ground that it was a penal prosecution which had been instituted, not one the object of which was to recover back the property; the property was no longer in jeopardy and therefore the clerk had no longer authority. Here the object was to get possession of the property. [SIR ROBERT P. COLLIER:—I cannot subscribe to the principle that an authority arises to put the criminal law in motion in order to get restitution of property, where admittedly it does not arise for a more legitimate purpose.] Assuming that there was some evidence that the manager had authority in this case, was there misdirection? It is not every misdirection which will entitle the parties to a new trial. The Judge may assume that the controversy is not as to the fact but as to the law; if he assumes it erroneously, being misled by the parties, that is no ground for a new trial. The evidence given was merely to fortify the legal presumption of authority. [SIR MONTAGUE E. SMITH:—If you admit the Defendants' evidence, then there ought to have been a nonsuit, if you do not, it should have been left to the jury. SIR BARNES PEACOCK:—When the Defendants objected that there was no evidence of authority, the Judge said in effect, I think there is, but as its effect is disputed, I will not put it to the jury but decide it myself.] As to the authority of a manager, on this subject see *Mackay* v. *Commercial Bank of New Brunswick* (3). It was within the scope of *Wilkinson's* authority to prevent the Respondent from absconding. See also *Bank of British North America* v. *Strong* (4).

Mr. *Arbuthnot* replied.

March 4. The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This is an action for a malicious prosecution brought against the *Bank of New South Wales*, an incorporated company.

(1) Law Rep. 5 C. P. 445.
(2) Law Rep. 6 Q. B. 65.
(3) Law Rep. 5 P. C. 398, 410.
(4) 1 App. Cas. 307.

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The circumstances leading to the prosecution, which it is now admitted was groundless, are the following:—

In March, 1876, a bill at thirty days sight for £1500 was drawn by Messrs. *Morgan, Connor, & Glyde*, a firm trading at *Adelaide*, in *South Australia*, upon the Plaintiff, Mr. *Owston*, a merchant trading at *Sydney* under the firm of *Owston & Co.* The bill was drawn against a consignment of wheat shipped on board the *Sea Gull*, and was sent with the shipping documents by the *Adelaide* branch of the Defendant bank to the head bank at *Sydney*.

On Saturday, the 18th of March, the bank left the bill with the Plaintiff for acceptance. He wrote his name upon it, but it was not called for until the morning of Tuesday the 21st. Meanwhile, on the afternoon of Monday, the 20th, the Plaintiff had received the following telegram from the drawers: "*Sea Gull* put back leaky;" and on the same afternoon he telegraphed in reply, "Do you wish us to accept draft, or will you instruct extension of sixty days?" On the morning of Tuesday, the 21st, about 11 o'clock, a clerk from the bank called for the bill, and the Plaintiff shewed him the telegrams. He did not give the bill to him, but sent a clerk to the bank to explain the matter, and it was arranged that the bank should wait until 1 o'clock for the return of the bill. About that hour, and before the Plaintiff had received an answer to his telegram, he returned the bill to the bank, having previously cancelled his acceptance. In the afternoon of the same day the following telegram from *Adelaide* reached the Plaintiff: "Bank instructed extend draft to sixty days." A telegram to the same effect was received by the bank.

The bill, when returned to the bank by the Plaintiff, was sent on the same afternoon by *Hobbs*, one of its clerks, to Messrs. *Allen, Bowden, & Allen*, who are notaries, and also solicitors of the bank, to be presented by them for noting, and what took place with respect to this presentment produced the misunderstandings which led to the prosecution complained of.

On the following day, Wednesday, the 22nd, a clerk of Messrs. *Allen & Bowden*, a lad called *Muir*, brought the bill to the Plaintiff for acceptance. The Plaintiff's evidence is to the effect that he understood the lad to be one of the bank clerks, and having in his mind the telegrams as to the alteration of the days of

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sight, he inquired of him how the bank wished the acceptance to be. The clerk said he knew nothing about that. The Plaintiff then told him that he would accept the bill and send it round to the bank, and it was left with him. Shortly afterwards *Bishop*, another clerk of Messrs. *Allen & Bowden*, came for the bill, and demanded to have it returned. According to the Plaintiff's evidence, he was not aware that *Bishop* was other than a bank clerk. He says that he again inquired how the bill was to be accepted, and told *Bishop* he would accept and send the bill to the bank. He says *Bishop* behaved in a violent manner and declared that he should treat what he had said as a refusal to return the bill. The Plaintiff's account of these conversations is contradicted, but for the purpose of this general statement may be assumed to be correct. The Plaintiff, in fact, soon after sent the bill to the bank accepted, having first made it payable at sixty days' sight, and it appears to have reached the bank about 1 o'clock.

Unfortunately the fact of the return of the bill was not communicated by the bank to Messrs. *Allen & Bowden*, as it ought to have been, and they remained under the impression that the Plaintiff was still keeping it in his possession. Another interview took place between *Bishop* and the Plaintiff; they met in the street. The Plaintiff declined to have anything to say to *Bishop*, and unfortunately did not tell him what would have prevented further trouble—that the bill had been sent to the bank. *Bishop* said, on parting, that he would go for the police. A consultation was held in Messrs. *Allen & Bowden's* office, and apparently, on the assumption that the Plaintiff was improperly withholding the bill, and that they as notaries were responsible to the bank for its return, it was resolved to take criminal proceedings. *Bishop* and *Muir* then went to the police magistrate and applied for a warrant to apprehend the Plaintiff on the charge of stealing the bill. The magistrate refused to grant a warrant, but issued a summons to the Plaintiff to appear on the next day to answer a charge of feloniously stealing a bill of exchange of the value of £1500, the property of the bank. The information was laid by *Muir*. As soon as he was served with the summons, the Plaintiff went to the bank, and after inquiring for the general manager, who was engaged, saw Mr. *Wilkinson*, the acting manager, and complained

to him of the course which had been taken. There is great conflict of testimony as to what occurred at this interview, but an explanation then took place, and there seems no doubt that after the interview it was resolved not to press the charge. Application was made by the solicitors to the magistrate to be allowed to withdraw it, which was refused, and upon the case being called on the next morning, the Plaintiff being present in obedience to the summons, no evidence was offered in support of the charge, and the case was dismissed.

The Plaintiff then brought the present action against the bank.

On the trial Mr. Justice *Manning* properly held that the prosecution was without reasonable cause, and it was found by the jury to have been commenced from improper motives, and was therefore malicious. No question now arises on this part of the case.

The two questions which were mainly contested at the trial and argued at their Lordships' bar are: (1) whether the proceedings of Messrs. *Allen & Bowden* were authorized by *Wilkinson* on behalf of the bank; and (2) if they were, whether the bank was responsible for *Wilkinson's* acts. At the trial the jury specially found the first question in the affirmative. Upon the second question, the learned Judge told the jury, according to his own statement of his direction, "that it was to be inferred from Mr. *Wilkinson's* position as manager that he had sufficient power under the circumstances for directing a prosecution," and the verdict passed in accordance with this ruling.

A rule *nisi* to enter a nonsuit or for a new trial was granted on the following grounds:

1. That the special finding of the jury (that Mr. *Wilkinson* authorized the prosecution) was against evidence, and had no evidence to support it.

2. That the Judge was in error in directing the jury that the acts of Mr. *Wilkinson*, the acting manager, were, as regards the prosecution, the acts of the bank for which the bank was responsible.

3. That there was no evidence that the prosecution was in fact or in law a prosecution by the bank.

This rule, after an argument before the Chief Justice, Mr. Justice *Hargrave*, and Mr. Justice *Manning*, was discharged. The Court

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was unanimous in refusing to disturb the finding of the jury as to *Wilkinson* having authorized the proceedings; but on the question of the correctness of Mr. Justice *Manning's* ruling as to the responsibility of the bank for his acts, which that learned Judge and Mr. Justice *Hargrave* sustained, the Chief Justice dissented from his colleagues.

One point argued in the Court below was that the bank, being a corporation, could not in any case be liable to an action of this kind. The Chief Justice (the other Judges taking the opposite view) held the law to be so, to use his own words, "on the plain ground that malice being a state of mind, cannot be attributed to a corporation which has no mind," and he relied on the judgment of Baron *Alderson* in *Stevens* v. *Midland Counties Railway Company and Lander* (1), which, as reported, no doubt supports this view.

The learned counsel for the Appellant (Mr. *Benjamin*) acknowledged that, after recent decisions, he could not support this broad proposition, and confined his argument to the two questions above indicated.

Upon the first of these questions, evidence was given on the part of the Plaintiff of statements made by *Wilkinson*, in the conversation which took place when the Plaintiff went to the bank to complain of the proceedings, to the effect that he had given instructions for them. This was wholly denied by *Wilkinson*. It appeared that *Wilkinson* was at the solicitors'office on the morning of the day on which the summons against the Plaintiff was issued. But it was stated both by him and the solicitors that he was there on other business, and that whilst engaged with Mr. *Bowden*, Mr. *Allen*, who was attending to the matter of the bill, came in and mentioned that the Plaintiff refused to give it up; upon which *Wilkinson*, having asked from whom he got the bill, and being told from *Hobbs*, the bill clerk of the bank, remarked, "You got the bill from the bank, and will have to return it; you are responsible." They all denied that *Wilkinson* had given any instructions to the solicitors in the matter. Their Lordships are very much disposed to agree in the view expressed by Mr. Justice *Manning*, "that there is a great deal of strong evidence for the

(1) 10 Ex. 352.

Defendants to shew that the solicitors acted on their own responsibility, and in defence of their own possession of the bill, in their capacity of notaries, and not for or on behalf of the bank." They cannot, however, say that there is not some evidence to support the finding of the jury on this question; and that finding having been sustained by the judgment of the Court below, they intimated to the learned counsel at the close of the argument for the Appellants that they should not feel justified in sending the case to a new trial upon this point, if it stood alone.

The point remaining for consideration, viz., the liability of the bank for the acts of *Wilkinson*, is of more general importance. The first question which arises on this point is, whether the direction of the learned Judge to the jury to the effect that it was to be inferred from *Wilkinson's* position that he had authority to direct the prosecution—thus practically withdrawing the question from the jury—was correct, and their Lordships think that upon the evidence given at the trial it was not.

No proof was offered by the Plaintiff of the position, duties, and powers of the acting manager; but the Defendants examined him, and also the general manager, who gave the following evidence on the question of his authority:

"Mr. *Wilkinson* said:

"Mr. *Shepherd Smith* is general manager. I have been acting manager since August last. I have had no instructions from the board or general manager authorizing me to prosecute or bring actions, nor any instructions not to do so. It is not our practice; we go to a higher authority. I have had occasion to refer to the general manager when any occasion arose about bringing any action, or to the board. Since I have been acting manager have never taken criminal proceedings without authority of board. In a case where a man presented a cheque forged I have as accountant, and should now, take proceedings to arrest where we have to catch the man on the spot, only in such a case. I should do this as acting manager, or as assistant manager, accountant, or clerk."

The following is the Judge's note of the evidence of Mr. *Smith*, the general manager:

"I have heard generally of the information against Mr. *Owston*.

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I gave no instructions whatever; had not heard a syllable about the matter. Mr. *Wilkinson* is acting manager. He had no instructions at all to take any criminal proceedings against anyone. Mr. *Wilkinson's* duties are the ordinary duties of a bank manager. The practice since I have been in the bank (twenty-two years) has been that no such proceedings shall be taken except by express instructions of the board.

"The board meets twice a week, ordinary and occasionally special meetings; a special meeting might possibly (*sic*) in an hour, and possibly in two hours. In the absence of the board it would be the duty of the acting manager to take the instructions of the general manager. *Allen, Bowden, & Allen* have no general authority given to them expressly to take criminal proceedings unless specially instructed; they have no authority to bring any action or take any proceedings.

"Cross-examined by Mr. *Stephen*:—I say practice for twenty years not to take proceedings to arrest or to summons without referring to the board. I have no direct recollection of any such case, but I think I can refer to such cases, criminal cases, in our minutes. I can recollect no case of any case of proceedings for stealing from the bank being referred first to the board, nor for forgery.

"By Mr. *Butler*:—I got instructions once at a board meeting not to commence (stopped). I cannot say whether a single case of criminal proceedings since; I believe there have been some, but cannot recollect any one. There have been many criminal proceedings for embezzlement by officers.

"The manager or acting manager have not taken upon themselves to prosecute, but the board direct.

"*Subject to Objections.*—In case of civil proceedings, the practice is to take the board's instructions before any action is commenced; that has been the practice during all my time as administrator of affairs.

"Cross-examined by Mr. *Stephen*:—I will not say that there have not been taken on P. notes without reference to the board; may have been so; will not say there may not have been hundreds of such cases within the last twenty years, nor 5000; very improbable, most improbable. I will not say that instructions to

sue have not often been sent between board days. I will not say that in cases in which property of bank taken and in danger of being lost unless arrest ordered, action has not been taken without reference to board.

"In such an emergency I should take the responsibility myself of violating the rule, whether it would be my duty or not."

Before considering the effect of this evidence, it will be convenient to refer to the series of authorities cited at the Bar. They all related to the liability of railway companies for wrongful arrests by their servants. In each of the two earliest cases, *Eastern Counties Railway Company and Richardson* v. *Broom* (1), and *Roe* v. *Birkenhead, &c., Railway Company* (2), the Plaintiff, who had been arrested at a station for refusal to pay the fare demanded, brought an action for false imprisonment. In both the question arose as to the authority of the officers at the station to make the arrest, and in both it was held there was not sufficient evidence of such authority to go to the jury. The decision in the first of these cases, upon the insufficiency of the evidence for the consideration of the jury, is scarcely consistent with later authorities. In the last of them, Baron *Parke* thought there was no proof that the servant "had ever received any general authority from the company to arrest any person who did not pay his fare, nor was there any evidence of any course of dealing to shew that, as a servant of the company, he was authorized to make any arrest on their behalf."

In the later cases a more particular inquiry was made into the character of the employment of the officer, whose acts were in question, and the nature of the duties entrusted to him.

In *Goff* v. *Great Northern Railway Company* (3) the Plaintiff had been arrested for travelling on the line without a proper ticket by an inspector of the company acting under the direction of the superintendent of the station. By the *Railway Clauses Consolidation Act*, 8 & 9 Vict. c. 20, ss. 103, 104, a penalty is imposed on any person travelling on a railway without having paid his fare, with intent to defraud, and power is given to all officers and servants on behalf of the company to apprehend such person. There

(1) 6 Ex. 314. (2) 7 Ex. 36. (3) 3 E. & E. 672.

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was evidence that the superintendent was the person in supreme authority at the station, and the jury having found for the Plaintiff, the Court refused to set aside the verdict, on the ground that there was no evidence for their consideration. Mr. Justice *Blackburn*, in delivering the judgment of the Court (1), observes: "The Court thought that, as from the nature of the case the decision whether a particular passenger should be arrested or not must be made without delay, and as the case may be not of infrequent occurrence, it was a reasonable inference that in the conduct of their business the company should have on the spot officers with authority to determine, without the delay attending on convening the directors, whether a person accused of this offence should be apprehended." And the Court held there was evidence for the jury that the persons who apprehended the Plaintiff had such authority, observing that it was difficult to see why the company paid the police if the inspector of their police was not to act for them to this extent.

This case turns therefore on the considerations that the summary power of apprehension given for the protection of the company could only be exercised (practically) on the spot, and instantly, and that the officers who acted were the fittest and indeed the only representatives of the company on the spot who could exercise it, and upon these considerations it was held that the jury might infer the necessary authority.

In the later case of *Edwards* v. *London and North Western Railway Company* (2) it was held that there was no evidence of the officer who had made the arrest having such authority. There a foreman porter who had the superintendence of the station yard in the absence of the station-master, gave the Plaintiff into custody on a charge of stealing timber which the foreman porter suspected to be the property of the company. The timber was in a van at the station. It did not appear that any timber was in the special charge of the foreman. The Plaintiff was well known, and in fact a gateman in the service of the company. It was held that there was no evidence of implied authority arising from the foreman's position to give into custody persons whom he might suspect to have stolen the company's goods. The apprehension in

(1) 3 E. & E. 681. (2) Law Rep. 5 C. P. 445.

this case was not in pursuance of any special duty entrusted to the servant, as to enforce laws or by-laws. The Court recognised the distinction that in the case of such a duty, authority might under certain circumstances be presumed, but held that the general authority sought to be inferred from the position of the foreman could not be so presumed. Other decisions adopt this distinction. In *Moore* v. *Metropolitan Railway Company* (1) the facts of the case were held to bring it within the authority of *Goff* v. *Great Western Railway Company* (2).

The case of *Poulton* v. *London and South-Western Railway Company* (3) was a peculiar one. The station-master had arrested the Plaintiff for non-payment, not of his own fare, but that of his horse; the law giving power to detain only for the former. Although it appeared that the station-master acted in the belief that the law authorized the arrest, and that he was protecting the interests of the company, it was held that his act was not within the scope of his authority, since it could not be inferred that the company had authorized him to do an act which under no circumstances could be lawful, and which they had no power to do themselves.

A question in some respects similar to that decided in *Edwards* v. *London and North-Western Railway Company* (4) arose in *Allen* v. *London and South-Western Railway Company* (5). It is to be observed that although in both these cases the Defendants happened to be railway companies, the questions involved in them might equally arise in the case of other masters. In the last it appeared that a clerk whose duty it was to issue tickets and put the money received in a till, which was kept under his charge, having given some money in change to the Plaintiff, who objected to one of the coins, a dispute arose, and the Plaintiff, it was alleged, put his hand into the till. The clerk thereupon seized the Plaintiff and gave him into custody, and the next morning charged him before a magistrate with feloniously attempting to rob the till. Mr. Justice *Blackburn*, who tried the cause, left it to the jury to say whether the clerk acted for his own ends and

(1) Law Rep. 8 Q. B. 36.
(2) 3 E. & E. 672.
(3) Law Rep. 2 Q. B. 535.
(4) Law Rep. 5 C. P. 445.
(5) Law Rep. 6 Q. B. 65.

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out of spite in consequence of the dispute, or whether he acted in furtherance, as he supposed, of the interests of his employers to protect their property. The jury found that the clerk was acting in defence of the company's property, and returned a verdict for the Plaintiff. The Court set this verdict aside and entered a nonsuit. It does not appear whether the clerk when he gave the Plaintiff into custody believed or suspected that he had actually taken any money, though the finding of the jury affords an inference that he acted under that belief. The charge however was for the attempt only, and the decision assumed there had been no more than an attempt. The Court adopted the principles on which *Edwards* v. *London and North-Western Railway Company* was decided. Mr. Justice *Blackburn* put two cases, as supposed cases only, and his so putting them shews how little questions of this kind have been before the Courts. He said he was disposed to think that if a servant in charge of money found another attempting to steal it, and could not prevent him otherwise than by taking him into custody, he might have an implied authority to arrest him, or if he had reason to believe that the money had been actually stolen, and he could get it back by taking the thief into custody, that also might be within the authority of the person in charge of it. The learned Judge, however, declined to pronounce a decided opinion on these cases, and held that there was clearly no implied authority to give the Plaintiff into custody for an attempt to steal which had failed.

In none of the cases referred to did the question of the authority of a manager or agent entrusted with the general conduct of his master's business arise. They were all cases of particular agencies where the agents had been appointed to a special sphere of duty. The result of the decisions in all these cases is that the authority to arrest offenders was only implied where the duties which the officer was employed to discharge could not be efficiently performed for the benefit of his employer, unless he had the power to apprehend offenders promptly on the spot; though it was suggested that possibly a like authority might be implied in the supposed cases of a servant in charge of his master's property arresting a man who he had reason to believe was attempting to steal, or had actually stolen it. In the latter of these cases it is part of the

supposition that the property might be got back by the arrest, but in such a case the time, place, and opportunity of consulting the employer before acting would be material circumstances to be considered in determining the question of authority.

The liability of the bank in this case must rest either on the ground of some general authority in the acting manager to prosecute on behalf of the bank, or on a particular authority so to act in cases of emergency.

The duties of a bank manager would usually be to conduct banking business on behalf of his employers, and when he is found so acting, what is done by him in the way of ordinary banking transactions may be presumed, until the contrary is shewn, to be within the scope of his authority; and his employers would be liable for his mistakes, and, under some circumstances, for his frauds, in the management of such business: *Mackay* v. *Commercial Bank of New Brunswick* (1). But the arrest, and still less the prosecution of offenders, is not within the ordinary routine of banking business, and when the question of a manager's authority in such a case arises, it is essential to inquire carefully into his position and duties. These may, and in practice do, vary considerably. In the case of a chief or general manager, invested with general supervision and power of control, such an authority in certain cases affecting the property of the bank might be presumed from his position to belong to him, at least in the absence of the directors. The same presumption might arise in the instance of a manager conducting the business of a branch bank at a distance from the head office and the board of directors. But whatever may be the case in instances of this kind, their Lordships think that such a presumption cannot properly be made from the evidence given at the trial as to the position held by Mr. *Wilkinson*. It appears that the board of directors held their meetings at the bank office, and the general manager, Mr. *Smith*, also sat there; and the clear inference from the evidence (if believed) is that the acting manager was subordinate to the general manager, and that the latter was, as he presumably would be, subject to the superior authority of the directors. Supposing this to be so (and if the facts were disputed,

(1) Law Rep. 5 P. C. 394.

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the opinion of the jury should have been taken upon them), their Lordships think it cannot be presumed, from his position alone, that the acting manager had general authority to prosecute on behalf of the bank, and therefore that evidence was required to shew that such a power was within the scope of the duties and class of acts he was authorized to perform. The Plaintiff offered no evidence whatever on this point; and the testimony of the two managers which has been set out above directly negatives the possession of such a power by the acting manager. Mr. *Wilkinson* was not cross-examined on this point. Some uncertainty of statement no doubt appears in the cross-examination of the general manager, but according to their Lordships' interpretation of his testimony, his direct evidence as to the absence of general authority in the acting manager is not substantially impaired. The following statements of these witnesses were strongly relied on by the learned counsel for the Appellants: Mr. *Wilkinson* said, "In a case where a man presented a forged cheque I have as accountant, and should now take proceedings to arrest, where we have to catch the man on the spot, only in such a case. I should do this as acting manager or as assistant manager, accountant, or clerk." The general manager spoke to the same effect: "I will not say that in cases in which the property of the bank is taken and in danger of being lost, unless arrest ordered, action has not been taken without reference to the board. In such an emergency I should take the responsibility of violating the rule, whether it would be my duty or not." But these statements at the most raise the question whether *Wilkinson* had authority so to act in cases of emergency, where immediate action is required, and the opportunity of arresting the offender might be lost if reference was made to the general manager or the directors. Granting that these statements afford some proof of such an authority, the further question would arise whether there is evidence that an emergency in fact occurred.

An authority to be exercised only in cases of emergency, and derived from the exigency of the occasion, is evidently a limited one, and before it can arise a state of facts must exist which shews that such exigency is present, or from which it might reasonably be supposed to be present. If a general authority is

proved, it is enough to shew, commonly, that the agent was acting in what he did on behalf of his principal. But in the case of such a limited authority as that referred to, the question whether the emergency existed, or might reasonably have been supposed to exist, arises for decision; and that question raises issues beyond the mere facts that the agent acted on behalf of and in the supposed interest of the principal; were it otherwise, the special authority would be equivalent to a general one.

What, then, was the situation when these unwarrantable proceedings took place? The bill had been sent to *Allen & Bowden*, as notaries, to be presented to the Plaintiff for acceptance, and noted if acceptance was refused. It was a trade bill accompanied by shipping documents, which were in the hands of the bank. The Plaintiff was a merchant having an office and clerks, one of them known to the notaries' clerk, and it was at his own office the bill was presented to him. According to the Plaintiff's evidence, he told the clerk he would accept and send it to the bank. The clerk (*Muir*) admits he said he would accept it, and thereupon the bill was left with him. *Muir* seems to have been blamed for leaving it, and *Bishop*, another clerk, went with *Muir* to the Plaintiff to demand it, and the Plaintiff, as *Bishop* says, put him off on two occasions, and would have nothing to say to him. Some temper appears to have been shewn on both sides. Upon *Bishop* going back to the office, a consultation took place among the clerks of Messrs. *Allen & Bowden*, and after referring to books, and apparently with the consent of one of the partners, it was determined to lay an information against the Plaintiff for stealing the bill. It cannot possibly be considered that this state of facts raised a case of emergency requiring immediate action by criminal proceedings against a person in the Plaintiff's position, or afforded reasonable ground for supposing that such a case had arisen. There was no necessity for immediate action, nor was immediate action in fact taken. The Plaintiff was not at once given into custody, but an information was laid before a magistrate, and when he very properly refused a warrant to apprehend him, the summons complained of was taken out when there could evidently be no urgency either to obtain or serve it. It was

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obviously an attempt of the notaries and solicitors to recover the bill by means which were thought by them to be more effectual for the purpose than civil proceedings would be.

Their Lordships therefore think, upon facts which appear upon the evidence to be beyond dispute, that there was no necessity or apparent necessity for immediate action, from which authority in the acting manager to instruct the solicitors (if he really did instruct them) to take these proceedings on behalf of the bank could be inferred.

It is to be observed, also, that the bill in question was not under *Wilkinson's* special charge. He says, "the matter was not in his department. It was a branch business; the general manager takes that."

There being then no evidence of any emergency, the case in their Lordships' view is brought to the issue that the bank would not be liable for the acts of *Wilkinson* unless it could be established that he had some general authority to institute criminal proceedings. They have already said that they think such an authority cannot be inferred from his position alone as it appears upon the evidence, and that the direction of the learned Judge was wrong. The verdict therefore cannot stand.

Their Lordships have lastly to consider whether they should direct a nonsuit or a new trial. The evidence upon which they have assumed the position of the acting manager to be as they have stated it, and the general evidence of the managers upon this part of the case were not, in consequence of the learned Judge's direction, considered by the jury. If their Lordships were called upon to put their own interpretation upon the evidence, they would be disposed—assuming it to be true—to hold that it does not afford sufficient grounds for inferring that a general authority to prosecute was within the scope of the acting manager's employment and duties; but they are not competent to judge of the credit due to the witnesses, which is the proper province of the jury; and on the whole, as the case on this point has not been presented to the jury, they have come to the conclusion that the rule should be made absolute for a new trial.

In case the action should be again tried, the jury should be told, if the evidence on the point should be to the same effect as on the first trial, that the facts do not present a case of emergency or apparent emergency from which authority could be derived, and consequently that the bank would not be liable for the act in question unless it is proved or can be inferred from the evidence that general authority to prosecute offenders for stealing the bank's property connected with its business at *Sydney*, without consulting the general manager or the board of directors, was within the scope of *Wilkinson's* employment and duties, and the powers entrusted to him in relation thereto.

The question whether *Wilkinson* in fact authorized the solicitors to prosecute the Plaintiff will of course be open on the second trial.

In the result their Lordships will humbly advise Her Majesty to reverse the judgment of the Supreme Court discharging the rule, and to direct that the rule be made absolute for a new trial.

The Respondent must pay the costs of this appeal.

Solicitors for Appellant: *Waltons, Bubb, & Walton.*
Solicitor for Respondent: *W. H. Gatty Jones.*

[PRIVY COUNCIL.]

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March 7, 8, 11; May 8.

HER MAJESTY'S ATTORNEY-GENERAL FOR THE ISLE OF MAN . . . . . } APPELLANT;

AND

THOMAS MYLCHREEST AND OTHERS . . RESPONDENTS.

ON APPEAL FROM THE COURT OF EXCHEQUER OF THE ISLE OF MAN.

Isle of Man—Customary Estates of Inheritance—Rights of the Crown—Minerals—Clay and Sand—Acts of Settlement.

20 LD 353
21 LD. 23.-5
31.-
2 26 LD 31
8 App Cas 509

The Crown is not entitled to the clay and sand in the customary estates of inheritance in the *Isle of Man*.

By the laws and customs of the Isle, the owners of customary estates of inheritance in customary tenements of Lord's Lands have from time immemorial without the license of Her Majesty or her predecessors, Lords of the Isle, as of right dug, raised, and got the clay and sand therein, and have removed and used the clay for manuring their own and other lands, and for other purposes, and have converted it into bricks and tiles for sale. There is nothing in the history of the title to the Lordship or Manor of *Man*, and of the customary tenures, from which it is necessarily to be inferred that the above custom could not have had a legal origin; and it may be presumed from the existence of the custom, if nothing to the contrary appears, that it grew up with the tenures as one of their customary incidents.

The saving clause in the Act of Settlement does not involve a negation of the custom nor override it:—*Held*, that the word "minerals," in that clause did not include clay and sand.

APPEAL from a decree (April 7, 1877) of the Court of Exchequer of the *Isle of Man*, dismissing with costs an information filed by the Attorney-General the 30th of January, 1874, the terms of which are set out in their Lordships' judgment, as also the circumstances which led thereto, and the proceedings taken thereunder.

Mr. *Gorst*, Q.C., and Sir *James Gell* (*Attorney-General for the Isle of Man*) (Mr. *W. W. Karslake* with them), for the Appellant:—

First, the Crown is entitled to mines and minerals of all descriptions within the Island. In 7 *Henry* IV., the Crown

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

granted by letters patent under the great seal to Sir *John De Stanley*, the Island, *Castle Peel*, and Lordship of *Man*, &c. (see Report of the Commissioners of Inquiry for the *Isle of Man*, 1792, p. 67; *Mills'* Ordinances and Statutes of the Isle, p. 511), in as full and ample a manner as they had been possessed by any of the former Lords or Kings of *Man*. Of former grants by the Crown the first that was noticed was by *Edward* III., to Sir *William de Montacute* (see *Gell's Parr's* Abstract, p. 22), and the last, a grant by *Henry* IV., to Sir *John Stanley* in 1405, for life. Among the general words in the grant of 1406 were the words "*minera, plumbi, et ferri.*" The mention of these minerals did not exclude clay and sand, any more than it would exclude gold, silver, and copper. It is contended that whatever the King did not give to Sir *John Stanley* he retained as against the tenants, and is now vested in Her Majesty. In 1667, *Charles* II. granted the gold and silver mines to the *Earl of Derby*. In 7 *James* I. (1610) there was a grant to the *Earl of Shrewsbury*, and another for twenty-one years, and the words "mines of lead and iron," are followed by the word "quarries" (*Mills*, p. 514), and no other words indicating unopened minerals and stone, yet it has never been doubted that these latter passed by the grant. The tenants on the Island never had or claimed any right to the minerals of any description, except stone and slate to a limited extent. See *Mills*, p. 164, where will be found certain "proposals" by the islanders to the *Earl of Derby*—afterwards carried into effect by the Act of Settlement in 1704. No claim is made in those proposals by the islanders to stone, clay, sand, gravel, or any other mineral. Reference was then made to the Act of Settlement (*Mills*, p. 163), especially to the saving clause; also the explanatory Act passed on the same day.

In *Ballacorkish Silver, &c., Mining Company* v. *Harrison* (1) it was held that the legal effect of the saving clause was that the Lord was possessed of the mines as of his own original title in the soil, and that he has all the rights incidental to that ownership. And in the explanatory Act the customary digging of the tenants is confined to flagg, slate, and stone, no right being given to clay or sand. Reference was then made to an Act 8 *James* I. The

(1) Law Rep. 5 P. C. 49, 62.

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grant of royal mines of gold and silver to the *Earl of Derby* expired in 1735 for want of heirs male, and so became vested in the Crown. Reference was then made to 12 Geo. 1, c. 28, and to the preamble of 5 Geo. 3, c. 26, and to the conveyance to the Crown by the *Duke of Atholl* in 1825 of whatever rights vested in him. [SIR MONTAGUE E. SMITH:—The Defendants admit that the Queen is seised in right of her Crown; and that carries everything, subject to proof of anything to the contrary.]

Second, there is no evidence of any customary right in the customary tenants to search for, win, work, take, or carry away, clay or sand. No claim was ever made by them to the minerals, which always belonged to the Lord. Minerals include sand and clay; see *Hext* v. *Gell* (1). There is no objection to their digging clay to manure the land; the complaint is that they are trying to exercise a new power of manufacturing and selling the clay. Reference was made to *Duke of Portland* v. *Hill* (2); *Bell* v. *Wilson* (3). The custom contended for is not certain or reasonable, and is therefore bad in law. It involves the destruction of the subject of the user, and is much more extensive than the custom as defined by the explanatory Act as to slate and stone. Reference was made to *Earl of Derby* v. *Duke of Atholl* (4); *Mill* v. *Commissioner in charge of the New Forest* (5).

Mr. *Joseph Brown*, Q.C., and Mr. *Sherwood* (of the Manx Bar) (Mr. *Drinkwater* with them), for the Respondents *Mylchreests*:—

With regard to the wide claim of the Crown (a considerable portion of the island consisting of sand and clay) it is contended, first, that the custom has on the evidence been proved as alleged. It goes back as far as living memory can carry it. In none of the Acts or grants is there any mention of clay or sand; but there is the old word "delfs" in the Act of 1704, which is not applied to sand or clay. From the evidence of custom a grant must be presumed, and no claim was made by the Crown till 1867. There is no indication in any of the grants of a claim to anything except mines and minerals. [SIR ROBERT P. COLLIER:—And if the

(1) Law Rep. 7 Ch. Ap. 699.
(2) Law Rep. 2 Eq. 765.
(3) Law Rep. 1 Ch. Ap. 303.
(4) 1 Ves. Sen. 202; 2 Ibid. 337.
(5) 25 L. J. (C.P.) 212.

Crown obtained the island by conquest, the custom would remain unless altered by the Crown.] Reference was made to *Gell's Parr's* Abstract, pp. 22, 23; and then to the following cases, to shew that customary tenants may make title to clay or minerals by this evidence of custom, and that it is a good custom: *Curtis* v. *Daniel* (1); *Hanmer* v. *Chance* (2); *Marquis of Salisbury* v. *Gladstone* (3); *Ecclesiastical Commissioners* v. *Bird* (4); *Bryant* v. *Foot* (5); *Jenkins* v. *Harvey* (6). These tenants have rights at least as sure as copyholders at will: *Stephen's* Commentaries [7th Ed.] vol. i., p. 218; and that they had rights, at least in the forests, see an Act of 1860: *Lamotte's* Statutes, p. 356. Secondly, there is nothing in Acts of Settlement of 1704 to give the Crown a title to the sand and clay, or to work the same. The principal Act settled and confirmed the tenure described as a "customary estate of inheritance," being the ancient tenant-right estate. It created no new state of things between the lord and the tenants. It did not define the rights of customary tenants, so as to cut them down to the exact provisions thereof. It is not to be construed as if it were a grant *de novo*, subject to the saving clause as a new reservation, and without reference to any former customs or previously existing rights. It operates not as a grant, but as a confirmation. Even if the saving clause were to be construed without reference to evidence of custom, the same does not, on its true construction, include any minerals obtainable by quarries or open workings, other than flagg, slate, and stone, the only mineral named in connection with quarries. Reference was made to *Darvill* v. *Roper* (7); *Bell* v. *Wilson* (8). This Act should be construed like a conveyance, being very like a private Act of Parliament; and therefore evidence of contemporaneous and continuous usage was admissible: *Chad* v. *Tilsed* (9); *Duke of Beaufort* v. *Mayor of Swansea* (10); *Doe* d. *Kinglake* v. *Beviss* (11); *King* v. *Scot* (12). Clay and sand are a very large part of the

(1) 10 East, 273.
(2) 4 D. J. & S. 626.
(3) 6 H. & N. 126; 9 H. L. C. 692, 703.
(4) Nov. 7, 1878, unreported.
(5) Law Rep. 2 Q. B. 161.
(6) 1 C. M. & R. 877.
(7) 3 Drew. 294.
(8) Law Rep. 1 Ch. Ap. 303.
(9) 2 B. & B. 403.
(10) 3 Ex. 413.
(11) 7 C. B. 482.
(12) 3 T. R. 602.

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land itself, and it cannot reasonably be supposed that the Lord was to hold this. Such a supposition is repugnant to the context of the Act and to common sense. The recitals of the explanatory Act (which also does not mention clay and sand) shew that both Acts must be construed with reference to the custom.

Mr. *E. S. Roscoe*, for the tenants, *Moore* and others.

Mr. *Gorst*, Q.C., replied.

1879 *May* 8.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

The questions raised in this appeal are, whether the Crown is entitled to the clay and sand in the customary estates of inheritance in the *Isle of Man*, and to an injunction to restrain the customary tenants from taking, winning, and working these substances.

The information filed by Her Majesty's Attorney-General for the Isle alleges that Her Majesty, in right of her crown, is seised in her demesne as of fee of the Island, *Castle Peel*, Lordship, and territory of *Man*, and that Her Majesty and all former Lords of the Isle have been seised of the Manor of *Man* (commonly called the Lord's Lands), and of "all mines and minerals of what nature and kind soever, and quarries and delfs of flagg, slate, or stone within the said Manor," with the right, according to the laws and customs of the Isle and Manor, to enter upon the lands, and to search for, work, and win the same, making compensation to the customary owners of the lands for surface damage. It then alleges that the first Defendant *Mylchreest*, the owner of a customary estate called *Ballaharra*, had (by his guardian) granted a lease or license to the Defendants, *Moore* and others, to dig clay and sand in this estate for the manufacture of bricks, tiles, and pottery. The information prays that it may be declared that Her Majesty is seised of or entitled to all mines and minerals of what nature or kind soever within the lands called *Ballaharra*, including clay and sand, and all other substances which can be gotten from underneath the surface of the earth for the purpose of profit, whether the same be gotten by open cutting or by underground working, with the right to enter and work them. It also prays

that the lease to *Moore* and others be set aside, and for an injunction to restrain the Defendants from winning and working clay and sand.

The answer admits the right of the Crown to certain mines and minerals, and to win and work them, but alleges, with regard to clay and sand, that by the laws and customs of the Isle the owners of customary estates of inheritance in customary tenements of Lord's Lands have from time immemorial without the license of Her Majesty or her predecessors, Lords of the Isle, as of right dug, raised, and got the clay and sand therein, and have removed and used the clay for manuring their own and other lands and for other purposes, and have converted it into bricks and tiles for sale. The custom is set out at great length, and in divers forms in the answer.

The circumstances which immediately preceded the filing of the information are worthy of remark.

On the 20th of February, 1867, the Crown granted a lease of the mines and minerals (except slate and stone) under the estate of *Ballaharra* to the Defendants *Moore* and others, who, by virtue of it, proceeded to get and work the clay and sand in that tenement.

The Defendant *Mylchreest* thereupon (on the 25th of June, 1867) filed a bill in the Chancery Court of the Isle to restrain these workings, and for an account. An injunction was granted, and subsequently a decree was made against the Crown lessees for payment to *Mylchreest* of the amount of profit made by the workings.

In consequence of this decree the lessees surrendered their lease to the Crown. The Crown did not think fit at that time to contest the claim of the customary tenant, and accepted the surrender. The same persons who had been the Crown lessees then took a lease from the customary tenant, *Mylchreest*, of the clay and sand in his tenement, and were working under it, when the present information was filed, to which they were made Defendants.

A considerable body of evidence has been produced by the Defendants to prove the custom they have set up. It appears that a bed of clay exists under the whole, or nearly the whole, of the northern part of the Isle, and also under the district in which

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Ballaharra is situate. Numerous witnesses, many of them of great age, proved that clay and sand had been largely dug up, used, and sold by the owners of the customary tenements. One witness said, "All over the north district there are hundreds of clay or marl pits, some in actual use, and others disused." Numerous brick and tile works exist, some of them ancient, which have been supplied with clay from the customary tenements. A witness proved that for upwards of forty years clay had been dug and sold from *Ballaharra* itself. Bricks have been used in buildings in the isle long before living memory. In the town of *Douglas* they have been largely used. The existence of old pits and works in the customary tenements establishes the fact of ancient workings. The proof of taking and using sand by tenants is equally strong. Their Lordships do not think it necessary to go at length into the details of the evidence, for it is all one way, the Crown having given no evidence upon the fact of the usage. It will be sufficient to add to what has been already stated, that it was shewn that the Crown by its lessees and licensees, in ancient times and recently, worked metalliferous mines and quarries of stone within the customary tenements, but it was not shewn to have ever granted a lease of clay or sand, or a license to dig for them. There is no trace that the agents of the Crown ever interfered with the customary tenants in taking, using, and selling these substances. Moreover, it was proved that clay had been constantly sold by the customary tenants of *Ballaharra* to the managers of the Crown mines for use in those mines from the time when the Defendant *Mylchreest's* grandfather was owner of the estate down to the present time. Their Lordships can come to no other conclusion upon this evidence than that the custom has in fact existed during and beyond the period of living memory: and, consequently, that its antiquity, and continued existence from a time when it might have had a valid commencement, ought, unless the contrary appears, to be presumed.

The first answer on the part of the Crown, as their Lordships understood it to be, was that it is to be inferred from the state of the title to the Lordship of the Isle and the nature of the customary tenures, the custom could not have had a legal origin. It was further contended that under the Act of Settlement of the

year 1705, for settling and confirming the customary tenures, clay and sand were reserved to the Lords, and that the custom was either disproved or displaced by this reservation.

It is not necessary to enter at any length upon the early history of the Isle prior to the reign of *Henry* IV. It will be found in *Parr's* "Abstract of the Laws, Customs, and Ordinances of the *Isle of Man*," edited by Sir *James Gell*, the present Attorney-General for the Isle. From the authorities there collected it appears that the Kings or Lords of the Isle were in early times subject to the Kings of *Norway*. The Isle afterwards fell under the sovereignty, with many alternations, of the Kings of *Scotland*, and of *England*. In the reign of *Edward* III., the Earl of *Salisbury* conquered the Isle from the Scots, and received a grant of it from that king. From the time of this conquest the Isle remained subject to the crown of *England*, and although the Lords were styled Kings down to the reign of *Edward* IV., when *Thomas*, Lord *Derby*, renounced that title, the paramount sovereignty of the Isle resided in the English Crown. In the reign of *Richard* II. the Isle was sold by a son of the Earl of *Salisbury* to the famous *William le Scroope*, afterwards Earl of *Wiltshire*. After *Scroope's* unsuccessful rebellion and execution, *Henry* IV., claiming title to the Isle by conquest, granted it to the Earl of *Northumberland*. When the insurrection, in which that Earl's family took part, was subdued by the battle of *Shrewsbury*, *Henry* IV. seized into his own hands the *Isle of Man*, and before the attainder of the Earl granted it, in the year 1405, to Sir *John Stanley*. The Isle remained virtually in the *Stanley* family until the sale of it to the Crown in recent times.

The above grant from *Henry* IV., and the subsequent state of the title, are set out in the preamble of the Act 5 Geo. 3, c. 26, which was passed for carrying into execution a contract for the sale of the *Isle of Man* by the Duke and Duchess of *Atholl* to the Crown. The devolution of title is not material to the questions in the appeal. It will only be necessary to refer specifically to some grants in which mention is made of mines and to an Act of Parliament in the reign of *James* I., which prohibited the alienation of the Lordship, as some arguments have been built upon these documents.

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In the original grant from *Henry* IV. to Sir *John Stanley*, among the general words, which are very numerous, are "mines of lead and iron." There is no mention of other mines or minerals. In a grant of the seventh year of the reign of *James* I., the general words include "mines of lead and iron and quarries."

The Judge in the Court below considered that it might be inferred, from the special mention of mines of iron and lead, that other mines and minerals did not pass by these grants from the Crown. It appears to their Lordships that an inference of this kind could not, if there were no proof of custom, be drawn from this limited description. The rest of the language of the grants is quite large enough to carry the full title to the soil of the Isle, including minerals (except perhaps precious minerals) so far as the Crown could grant them. But, on the other hand, the Lordship could only be granted subject to the rights which the customary tenants might then have acquired by custom or otherwise in their tenements, and this limited description of mines and minerals is so far material that it would be consistent with the custom set up by the Defendants, if it then existed.

It may be as well to mention, as part of the history of the Island, that *James* I. granted the Abbey lands, which are distinct from what are called Lord's Lands, to one of the Earls of *Derby*. *Charles* II. also granted to the then Earl of *Derby* the royal mines of gold and silver. But neither of these grants affects the questions in this suit.

All the rights which belonged to the *Stanley* family under these various grants have been purchased by and are now vested in the Crown by virtue of the Act of 5 Geo. 3, already referred to, and subsequent statutes. The treaty for sale, recited in the Act of 5 Geo. 3, states that the Duke and Duchess of *Athol* had agreed to surrender to the Crown the Isle with all the rights in and over the soil as lords of the manor, "and all mines, minerals and quarries, according to their present rights therein." This language, it is to be observed, is by no means descriptive of unqualified rights.

By the Act of 7 James I., already referred to, the Isle was settled upon the sons of *William* Earl of *Derby* in tail male, and made inalienable by them. It has been contended at the Bar, on the part of the Crown, that this prohibition bound not only the

heirs in tail, but the heirs general of the Earl, and therefore that from the time of this Act no grant or concession of the clay and sand to the tenants could be valid. The question whether the clause against alienation bound the heirs general, to whom the Lordship of the Isle ultimately came, was a good deal discussed in the Court of Chancery in the case of the *Bishop of Sodor and Man* v. *Duke of Atholl* (1). Their Lordships, however, do not feel themselves called upon to consider this nice question; for, assuming that the prohibition be taken to bind the heirs general of the Earl, it would not interfere with the view they are disposed to take of the rights of the customary tenants.

That the estates of these tenants were originally of a low kind is abundantly clear. Certain Ordinances printed in *Mills'* Collection of the Ancient Ordinances and Statutes of the *Isle of Man*, and which are described as "Ordinances, statutes, and customs presented, reputed, and used for laws in the *Isle of Man*, that were confirmed as well by Sir *John Stanley*, King and Lord of the same land, and his predecessors, as by all barons, deemsters, tenants, inhabitants, and commons of the same land," were referred to on this point.

From the first Ordinance in this collection, which is without date, and from another dated in 1422, it may be inferred that the tenants then held from year to year, though probably even at that early period with some customary privilege of renewal. Yet, however precarious these tenures may have originally been, they had certainly come to be treated as permanent and alienable holdings before 1583, for in that year an Ordinance was passed prohibiting any grant, sale, or exchange of their lands by the tenants without the license of the Lord or his council upon pain of forfeiture—not of the lands—but of a pecuniary fine.

An Ordinance of 1593 affords distinct evidence that at that time the customary tenures were deemed to be heritable estates. It is a law of limitation, and provides that "if any person shall pretend title to any farm, house, or ground within the Isle, and does not exhibit his bill in writing for the same before the Earl, or his lieutenant or principal officer, whereby it may be entered of record within the space of twenty-one years next after he or his ancestors

(1) 2 Ves. Sen. 337.

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have been dispossessed thereof, then he and his successors to be utterly barred from making any title thereunto."

But the antiquity and nature of these customary estates is placed beyond doubt by the Act of Settlement of 1703, by which they are declared to be ancient customary estates of inheritance, descendible from ancestor to heir, according to the laws and customs of the Isle.

Having now adverted to the history of the title to the Lordship or Manor of *Man*, and of the customary tenures, the question arises whether there is anything in that history from which it is necessarily to be inferred that the custom in question could not have had a legal origin. Their Lordships are of opinion that there is not, and therefore that, unless such an origin is negatived by the Act of Settlement of 1703 to be hereafter adverted to, or other evidence, it ought from the existence of the usage during and beyond living memory to be presumed.

The customary tenures, even in the earliest times to which the evidence extends, were not so base as that of copyhold tenants at will, and there seems to be no reason why usages which in this country have been engrafted on holdings at will as legal customs should not equally be engrafted on the tenures in the Manor of *Man*.

In considering whether the custom is ancient and immemorial, the question is not encumbered by the arbitrary rule of the English law, which has fixed the reign of *Richard* I. as the period of legal memory. From the evidence that the custom has existed beyond living memory, it may, their Lordships think, be presumed to have had an origin, if that were necessary to be found, before the grant of *Henry* IV. to Sir *James Stanley*, and certainly before the prohibition against alienation in the Statute passed in the eighth year of the reign of *James* I. How much earlier it is unnecessary to inquire. It is sufficient to say that the evidence warrants the presumption that the custom grew up with the consent of former Lords of the Manor of *Man* at a time when they were free to give consent. The customary tenures themselves, which are described and declared in the Act of Settlement to be ancient, must have so grown up, and it may be presumed from the existence of the custom, if nothing to the contrary

appears, that it grew up with the tenures as one of their customary incidents.

Customs of a similar kind claimed by copyhold and customary tenants were established and held to be valid in *Hanmer* v. *Chance* (1); and *Marquis of Salisbury* v. *Gladstone* (2).

Their Lordships have now to consider the effect of the saving clause in the Act of Settlement of 1703. It was contended on the part of the Crown that, whatever might be the evidence of usage, this clause involved a negation of the custom or overrode it.

The Act was passed by *James, Earl of Derby*, Lord of the Isle, and his officers, and twenty-four Keyes, representatives of the Isle. After declaring and confirming to the tenants their ancient customary estates of inheritance in their tenements, as already stated, it contains the following clause:—

"Saving always unto *James, Earl of Derby*, and all other persons who shall hereafter become Lords of the Isle, all such royalties, regalia, prerogatives, homages, fealties, escheats, forfeitures, seizures, mines, and minerals, of what kind and nature soever, quarries and delfs of flagg, slate, or stone, franchises, liberties, privileges, and jurisdictions whatsoever as now are or at any time heretofore have been invested in *James, Earl of Derby*, or in any of his ancestors, Lords of the Isle."

It was contended for the Crown that the word "minerals" used in the clause comprehended clay and sand. Doubtless, the word in its scientific and widest sense may include substances of this nature, and, when unexplained by the context or by the nature and circumstances of the transaction, or by usage (where evidence of usage is admissible), would, in most cases, do so. But the word has also a more limited and popular meaning, which would not embrace such substances, and it may be shewn by any of the above-mentioned modes of explanation that in the particular instrument to be construed, it was employed in this narrower sense.

In the case of the *Earl of Rosse* v. *Wainman* (3) the Court of Exchequer held that an Inclosure Act containing a clause re-

(1) 4 D. J. & S. 626. (2) 6 H. & N. 123; 9 H. L. C. 692.
(3) 14 M. & W. 859.

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serving to the lord of the manor all mines and minerals, the latter word was used in its full sense. The Court said, "The word 'minerals,' though more frequently applied to substances containing metals, in its proper sense includes all fossil bodies or matters dug out of mines;" and it decided that beds of stone found in the allotments which might be dug by quarrying, belonged to the lord. In coming to this decision the Court looked at the whole Act to ascertain its object and intention, and referred to other parts of it in support of its construction of the word.

An elaborate inquiry into the various senses in which the word "mineral" might be used was made by Vice-Chancellor *Kindersley* in *Darrill* v. *Roper* (1). In certain deeds of partition there occurred an exception of "the mines of lead and coal and other mines or minerals." Scientific witnesses were examined who, according to the report, agreed in defining minerals to be any crystalline or earthy substance, whether metalliferous or otherwise, existing in or forming part of the earth, and which might be worked by means of a mine or quarry. The learned Vice-Chancellor refused to interpret the word in this sense, and construed it, according to what he considered to be the intention of the parties to be collected from the deeds, to mean such minerals only as are worked by means of mines. He consequently held that quarries of limestone were not within the exception. In this case the Vice-Chancellor sought to discover from the general scope of the deeds the sense in which the parties had used the word.

Vice-Chancellor *Kindersley* gave the same construction to the word "minerals" when used in an exception in a modern conveyance of land, and held that freestone did not come within it. His opinion on this point was overruled by the Lords Justices; but they at the same time agreed with him in his construction of the power to work the minerals, holding that the grantee could only get the freestone by underground working. The exception in this case contained the word "metals" before minerals, indicating that the latter word was intended to embrace substances other than metals. The deed also contained nothing from which it could be inferred that the word "minerals" was not to have its full meaning. Lord Justice *Turner* said, "Freestone is a mineral,

(1) 3 Drew. 294.

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and I can find nothing in the nature or context of this deed to shew that it was not intended to be included in the exception:" *Bell* v. *Wilson* (1).

The last decision to which reference need be made is *Hext* v. *Gill* (2). In that case the Duke of *Cornwall*, as lord of a manor, had granted the freehold of a tenement to the copyholder, reserving "all mines and minerals within and under the premises," with power to work them. It was held that a bed of china clay was within the exception. An injunction was, however, at the same time granted to restrain the Duke from getting the china clay in such a way as to destroy or seriously injure the surface, though, as the Court observed, this was the only way in which it could be got. Lord Justice *Mellish* stated the result of the authorities, in his view, to be, "that a reservation of minerals includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or nature of the transaction to induce the Court to give it a more limited meaning." In that case there was nothing in the context or nature of the transaction to explain or qualify the word, nor any usage to shew in what way the parties had interpreted it. On the contrary, the nature of the transaction, in the view of the Lord Justice, supported the widest construction of the word. He went on to observe, that the lord of the manor is beyond all question entitled to the minerals in the most general sense of the word under a copyhold tenement, and that there is nothing the copyhold tenant is entitled to get out of the soil and sell for a profit, adding, however, the important qualification, "in the absence of special custom." It was not pretended in that case that any custom existed, and consequently the exception of minerals in its widest sense was consistent with the pre-existing position and rights of the parties.

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In the present case, a custom for the tenants to take clay and sand has been shewn to exist. It was not therefore, *à priori*, to be expected that anything would be found in an Act passed for declaring and confirming the existing rights of the tenants which should destroy one of those rights.

The words "quarries and delfs of flagg, slate, or stone" appear

(1) Law Rep. 1 Ch. Ap. 303. (2) Law Rep. 7 Ch. Ap. 699.

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to be used to describe open workings, and the specified substances got by such workings, as distinguished from mines properly so called, and mineral substances usually got by underground works. The word "delfs" probably means open pits or diggings. If the word "minerals" were intended to be used in its widest signification, it was obviously unnecessary to make specific mention of flagg, slate, and stone. The intention appears to have been to except two classes of things, first, mines, and all substances of whatever kind and nature got by mining, and, secondly, quarries and delfs, not of all substances which might be got by quarrying or open pits, but of those only which are specifically described. It is not disputed that clay and sand are got from open workings.

Again, the exception is by way of reference. The language is, "all such mines, minerals, &c., as now are or at any time heretofore have been invested in the said *James*, Earl of *Derby*, or in any of his ancestors, Lords of the said Isle." In the absence of evidence, one way or the other, it might be presumed that Lord *Derby* and his ancestors, as lords of the manor, had full right to all minerals, and though in the original grant to Sir *John Stanley* mines of lead and iron only are mentioned, that alone, as already observed, would not, in the absence of evidence of custom, be sufficient to limit the right. But, however that may be, the exception is not absolute, but framed by way of reference to antecedent rights.

In their Lordships' view, therefore, the reservation in the Act of Settlement cannot be relied on to disprove the existence of the custom, as it might have been if its language had been clear and unambiguous. They further think that the document is of a nature and date which allows of its uncertain language being interpreted by continuous subsequent usage; and if it be competent so to interpret the reservation, the usage in this case demonstrates that it could not have been the intention to employ the word "minerals" in a sense which would include clay and sand. It is scarcely conceivable, if the custom had not existed, or if the Act had really excepted clay and sand, that the customary tenants should have been allowed to commit what, on the hypothesis, would have been innumerable acts of trespass on the property of the Crown without a single instance of hindrance or interruption on the part of its officers.

The counsel for the Crown sought to draw an inference against the custom from the omission of any mention of it in the Act of Settlement. But the Act obviously did not describe, or profess to describe, all the rights and customs incident to the customary tenures. A striking instance to shew that it did not contain a catalogue of customs, such as the customary of a manor might be expected to give, is found in the Information itself, which alleges that by the custom of the Isle the Crown may dig and work the minerals, and use the land for winning, dressing, and making them merchantable, and for all necessary mining purposes, including the erection of machinery, making compensation to the tenants, according to custom, for surface damage. No power to enter and work the minerals is found in the reservation, and these important customs, on which the right of the Crown to work the reserved minerals depends, are not in any way mentioned or referred to in the Act. In a case lately before this Board, the custom for the Crown and its lessees to pay the tenants for surface damage done in working mines, properly so called, was admitted to exist, although it is not mentioned in the Act of Settlement: *Ballacorkish Mining Company* v. *Ridgway and others* (1).

Reference was made by the learned counsel for the Crown to a Supplemental Act passed soon after the Act of Settlement, which, among other things, provided that, notwithstanding the reservation of quarries and delfs of flagg stone and slate, the tenants should have free liberty to dig raise and dispose of stone and slate on their lands for their own use, and for the improvement of their own and their neighbours' tenements, as had been formerly accustomed. It was argued that if there had been a custom to take clay and sand, the tenants would have obtained a similar recognition of it. But the tenants doubtless considered that this custom was not affected by the reservation. It would not have occurred to their minds that the common substances of clay and sand were included in the terms "mines and minerals," whilst stone and slate being specifically mentioned in the reservation, an express declaration was naturally thought to be necessary to restore or confer the right to take and use these substances.

For the above reasons their Lordships are of opinion that the

(1) Law Rep. 5 P. C. 49.

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custom set up by the Defendants has been established, and that the Act of Settlement is not opposed to it. The judgment appealed from ought therefore to be affirmed, and they will humbly advise Her Majesty accordingly.

The Respondents will have the costs of this appeal.

Solicitor for the Appellant: *T. W. Gorst.*
Solicitors for the Respondent *Mylchreest: Griffin & Quayle.*
Solicitor for the Respondents *Moore and others: F. W. Adams.*

[HOUSE OF LORDS.]

THOMAS HUSSEY . . . . . APPELLANT;

AND

JOHN HORNE-PAYNE AND G. M. HORNE-PAYNE, HIS WIFE . . . . . } RESPONDENTS.

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Contract—Statute of Frauds—"Title to be approved by our Solicitors."

Where a Court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration.

Applying this rule, though the first two letters of a correspondence seemed to constitute a complete contract, the House, upon the whole of what had passed in letters and conversation, came to the conclusion that no concluded and complete contract had been established.

Per THE LORD CHANCELLOR:—*Quære*, whether the addition, in a written document, of the words "subject to the title being approved by our solicitor," could affect a contract for the sale of land, otherwise complete in itself?

Quære, whether the proper meaning of such words is more than that the title offered is not to be accepted without investigation, and that objections made on such investigation would be subject to the decision of a legal tribunal?

Per LORD SELBORNE:—The observation stated in *Jervis* v. *Berridge* (1), that "the *Statute of Frauds* is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties," affirmed.

APPEAL against a judgment of the Court of Appeal, reversing an order of Vice-Chancellor *Malins*, made in an action for specific performance, brought by the Appellant against the Respondents, in relation to a sale of certain freehold land situated at *North End, Fulham*.

Mrs. *G. M. Horne-Payne* was entitled for her separate use to the property in question called the *Mornington* estate. Negotiations for the purchase of the estate by Mr. *Hussey* had been going on when Mrs. *Horne-Payne* wrote the following letter, dated the 4th of October, 1876: "I cannot accept your offer of £35,000 for my freehold land at *North End*. I refused that sum for it 15 months

(1) Law Rep. 8 Ch. Ap. at p. 360.

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ago, when offered by Messrs. *Willett* through Messrs. *Saunders*. I am now willing to divide the difference between your offer and my price, and I am prepared to accept £37,500 for the entire freehold property, or £34,000 for the property without the *Mornington House* and 1½ acre of ground." This letter was addressed to Mr. *Weaver*, who was acting on behalf of Mr. *Hussey*.

On the 6th of October, 1876, Mr. *Weaver* sent an answer in the following terms: "I beg to acknowledge the receipt of your letter of the 4th instant, stating that you are willing to accept the sum of £37,500 for the whole of your freehold land at *North End* (including the *Mornington House* estate), and I hereby, on behalf of Mr. *Thomas Hussey*, of 96, *Kensington High Street*, accept your terms as above, and agree to pay you the said sum of £37,500 for your land as aforesaid, extending from *Hammersmith Road* to the *Hammersmith Railway*, subject to the title being approved by our solicitors."

It was alleged that there had been a suggestion made by Mrs. *Horne-Payne* that it would be for the mutual convenience of herself and Mr. *Weaver* that the purchase-money should be paid by instalments, but at a meeting of Mr. *Hussey*, Mr. *Weaver*, and Mr. *Gasquet* (the solicitor of Mr. *Hussey*), at the office of Mr. *Crowdy* (the solicitor of Mrs. *Horne-Payne*), it was said by Mr. *Crowdy* that he knew of no agreement to take the money by instalments, and that nothing less than the immediate payment of 10 per cent. of the purchase-money by way of deposit, and the payment of the residue in a few months would be accepted. It was stated that Mr. *Hussey* had been mistaken on this point, and his solicitors, on the 24th of October, 1876, wrote to Mr. *Crowdy* that, as he had said he could make no other arrangement for the payment of the purchase-money except 10 per cent. down as a deposit, and the balance in a few months' time, Mr. *Hussey* had no alternative but to decline the matter, and as soon as Mr. *Crowdy's* client should be prepared to treat on the footing of payment by instalments extending over about three years, they would be prepared to negociate again on Mr. *Hussey's* behalf. Mr. *Hussey* afterwards saw Mrs. *Horne-Payne*, and reminded her of the understanding about payment by instalments, and on the 25th of October, 1876, she wrote to Mr. *Weaver*: "I have this moment seen Mr. *Crowdy*,

and have given him positive instructions to accept Mr. *Hussey's* offer of payment by instalments in three years and the deposit down. This is very much against Mr. *Crowdy's* wishes, but I, after all, am the gainer or loser by it, and I have taken the responsibility."

Mr. *Crowdy*, on the 31st of October, 1876, wrote to Mr. *Gasquet* the following letter: "*Mornington Park* estate. We have had some farther communication with our clients hereon, and are authorized to state to you that they will be willing to carry out this sale upon the following terms which, we believe, correspond with what your client proposes, videlicet:

"1. A deposit of £10 per cent. to be paid down.

"2. Balance of purchase-money to be paid by three equal instalments from date of contract.

"3. Interest at £5 per cent. on balance unpaid from time to time.

"This we believe is all that relates to the money payments, the other details of the contract we can settle.

"We should add that this only binds our client on acceptance by yours."

On the same day Mrs. *Horne-Payne* wrote to Mr. *Weaver*, announcing that Mr. *Crowdy* had written accepting the terms proposed, of paying 10 per cent. down, and the balance in three years, and expressing a hope that the details might be carried out before the following Saturday.

On the 14th of November, 1876, Mr. *Weaver* called on Mr. *Crowdy* and left with him a complete statement of the terms as actually understood between the parties. The paper was headed "Proposal by Mr. *Thomas Hussey* for the purchase of the freehold property known as the *Mornington* estate." The instalments named therein were six, the first to fall due on the 25th of December, 1877, and a corresponding part of the estate was to be conveyed on the payment of each instalment. The last sentence of this proposal was "Upon the contract being signed the said *Thomas Hussey* is to be let into possession of the property." On the 21st of November Mr. *Crowdy* (who was then very ill) wrote to excuse himself for not having noticed at the time an "obvious mistake" in the paper left, and pointed out that the first instal-

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ment instead of being in December, 1877, ought to be in June, 1877, and Mr. *Gasquet* having afterwards called on Mr. *Crowdy*, and agreed to the suggested alteration, it was understood (as the statement of claim alleged) that Mr. *Crowdy's* counsel was at once to prepare the draft of the formal contract. The formal contract never was prepared, and after correspondence between the parties, beginning in March, 1877, this action was, in August, 1877, brought by Mr. *Hussey* claiming specific performance and damages, and farther relief.

The Defendants demurred on the ground that in the statement of claim no subsisting agreement was alleged of which specific performance was claimed, nor was there any memorandum or note in writing of such agreement signed by either of the Defendants, within the *Statute of Frauds*.

Vice-Chancellor *Malins* was of opinion that the offer of the 4th of October was unconditionally accepted by the letter of the 6th of October; that *Hussey* proposed to abandon it on the 24th of October on account of the difference as to the payment of the purchase-money by instalments, but that the Defendants declined to abandon it, and on the 25th of October conceded the payment by instalments; and that the subsequent negotiations between the parties did not constitute any legal abandonment of the contract; he therefore overruled the demurrer. This decision was reversed by the Court of Appeal (1), the Lords Justices being of opinion that there had not been a completed contract, for that the words "subject to the title being approved by our solicitors," constituted a new term which required acceptance.

Mr. *John Pearson*, Q.C., and Mr. *H. M. R. Pope*, for the Appellant:—

The two letters of the 4th and 6th of October, 1876, constituted a contract for the sale of the estate. There had been some previous negotiations which the letter of the 4th of October noticed and adopted; and the letter of the 6th of October was a formal acceptance of the terms stated in that of the 4th. The contract was, therefore, concluded and complete. The addition of the words "subject to the title being approved of by our solicitor" could

(1) 8 Ch. D. 670.

not affect the matter. They were mere words of form which were understood, if not expressed, in every negotiation and contract for the sale of land. The vendor was always bound to make out a good title, and unless he did so the purchaser was not bound to accept it. The words, therefore, were mere words of course. Yet the Court below had treated them as if they formed a precise, specific, and unaccustomed stipulation, and required to be formally assented to, and if not formally assented to, the contract could not be complete. That was not the way in which they were treated in practice. *Hudson* v. *Buck* (1) did not justify the purpose for which it was cited in the Court below. On the contrary, it really treated those words as the necessary accompaniment of any negotiations for the sale of an estate, without complying with which (where there was no *mala fides* or unreasonableness on the part of the purchaser) a sale could not be enforced. No *mala fides* existed here, nor was any unreasonable objection made. *Duddell* v. *Simpson* (2), *Page* v. *Robinson* (3), and *Price* v. *Dyer* (4) shewed that even if there had been some variations of terms after a contract had been really made, the Court would still enforce performance of it; and *Gordon* v. *Mahony* (5) established that there must be as clear evidence of the waiver of a contract as of the making of it. *Noble* v. *Ward* (6), affirmed on appeal (7), following *Moore* v. *Campbell* (8), proceeded on that principle. And even as to leases, where a first lease had been granted, and then a second, which recited the surrender and acceptance of surrender of the first, but which turned out to be itself inoperative, it was held that the first remained in force. Where there was a concluded and complete contract it could not be destroyed by anything less formal than itself: *Carolan* v. *Brabazon* (9); Vendors and Purchasers (10).

Mr. *H. Fox Bristowe*, Q.C., and Mr. *Benjamin*, Q.C. (Mr. *F. W. Bush* was with them), for the Respondents:—

The authority of the cases cited on the other side may be

(1) 7 Ch. D. 683.
(2) Law Rep. 2 Ch. Ap. 102.
(3) 3 Russ. 114.
(4) 17 Ves. 356.
(5) 13 Ir. Eq. Rep. 383.
(6) Law Rep. 1 Ex. 117.
(7) Law Rep. 2 Ex. 135.
(8) 10 Ex. 323.
(9) 3 J. & Lat. 201.
(10) Chap. iv. s. ix.

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admitted, but they are wholly inapplicable here. There never was a concluded and complete contract in this case. That was the real question to be decided here, and it must be decided on a consideration of all the circumstances of the case: *Rossiter* v. *Miller* (1). So considered it was clear that there never had been any contract of which performance could be directed.

Mr. *Pearson* replied.

THE LORD CHANCELLOR (Earl *Cairns*):—

My Lords, I will not refer, in the first instance, to the grounds upon which this case was decided by the Vice-Chancellor and the Court of Appeal, but I will ask your Lordships to observe what the facts of the case are upon which you have now to form an opinion. My Lords, at the outset I must say that I recognise the great convenience of having a case stated frankly and fairly as this case has been, upon the claim, and thereby enabling the Court, without the parties being put to any greater expense, to decide upon the claim, upon a demurrer being put in, whether the Plaintiff has a case in respect of which he is entitled to relief,

This is an action for specific performance of a contract. It is a contract for the sale of land, and the Plaintiff must shew two things: he must shew that there is a contract concluded between the parties, and that there is a note, a memorandum in writing, of that contract sufficient to satisfy the requirements of the *Statute of Frauds*. The second requisite in this case he proposes to supply through the medium of letters which passed between the parties, and it is one of the first principles applicable to a case of the kind that where you have to find your contract, or your note or memorandum of the terms of the contract in letters, you must take into consideration the whole of the correspondence which has passed. You must not at one particular time draw a line and say, "We will look at the letters up to this point and find in them a contract or not, but we will look at nothing beyond." In order fairly to estimate what was arranged and agreed, if anything was agreed between the parties, you must look at the whole of that which took place and passed between them.

(1) 3 App. Cas. 1124.

The first two letters in this case are dated the 4th and the 6th of October. In the first of them Mrs. *Horne-Payne*, who appears to have been entitled to freehold property for her separate use, stated that she was willing to "divide the difference" between an offer which had been made to her and the price she had asked, and to accept the sum of £37,500 for the freehold property, mentioning the name of the property. The answer was in these words:—[His Lordship read it, see *ante*, p. 312.]

Now I put aside these last words, "subject to the title being approved," for separate observation, and, putting them aside, I should say that if these two letters were the only information which your Lordships had upon the subject—if the matter had ended here as it began, with these letters—I should have been disposed to say that there was undoubtedly evidence of a concluded contract sufficient to satisfy the *Statute of Frauds*. There is property named, there is a price to be paid, and there is the name of the vendor and of the purchaser. And, of course, stopping there again, the words which I have read would imply that the purchase-money was to be paid in the usual way, namely, as soon as the title to the land could be produced by the vendor and a conveyance offered.

But the case does not stop there, and, we are told, partly by the statements of the Plaintiff and partly by farther letters which passed, very much more, which must be imported into the case and must be taken along with the letters which I have read. The first thing we are told by the Plaintiff himself is this: that "in the course of the negotiations which resulted in" these "letters, the Defendant had suggested that it would be for the mutual convenience of herself and the Plaintiff that the purchase-money should be paid by instalments, and the Plaintiff acquiesced." Now that is alleged to be a statement of a term of the agreement arranged outside what was written, but omitted to be mentioned in what was written. I look upon this more as a statement that it had been agreed between them that there should be a settlement as to the instalments in which the purchase-money was to be paid; that it should be paid by way of instalments, and not in one sum, but that it should be a subject of settlement what were to be the instalments in which the money should be paid.

And that seems also to be the view of the Plaintiff, because he

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continues, "Pursuant to this suggestion, she, shortly after the receipt of the letter of the 6th of October, 1876, viz. on the 11th of October, 1876, wrote to *William Weaver*" (the agent of the Plaintiff) "requesting him to meet her at the office of Mr. *Crowdy*, her solicitor, on the following day, 'to discuss the terms of payment, etc.;'" that is to say, to discuss the subject of a payment to be made by way of instalments and not in one gross sum—as I understand it—to arrange the instalments in which the payment was to be made. Then the Plaintiff continues: "Accordingly, on the 12th of October, 1876, the Plaintiff and his solicitor, Mr. *Gasquet*, and the said Mr. *Weaver*, called upon the said Mr. *Crowdy*. The said Defendant, however, failed to keep her appointment, and the said Mr. *Crowdy*, alleging that he knew of no agreement to take the purchase-money by instalments, stated that nothing less than the immediate payment of £10 per cent. of the purchase-money by way of deposit, and the payment of the residue thereof in a few months would be accepted," that is to say, *Crowdy* stood upon that which was written in those two letters. Those, said he (this was his view), constitute an agreement upon which we may rely; we hold you to them, and you must pay the purchase-money in one sum, putting aside the deposit, and on the usual terms.

But was that the view of the Appellant? Certainly not, because he says, "Meanwhile the Plaintiff, on the faith of the understanding that the purchase-money should be paid by instalments, had allowed certain arrangements which he had made for providing the purchase-money at once, to fall through. Shortly after the last-mentioned interview, therefore, in the belief that he had in this respect been unfairly treated by the said Defendant, he directed his solicitors to write, and they, on the 24th of October, 1876, wrote to the said Mr. *Crowdy*, that as he stated that he could make no other arrangement for payment of the purchase-money except 10 per cent. down as a deposit, and the balance in a few months' time, Mr. *Hussey* had no alternative but to decline the matter, and as soon as Mr. *Crowdy's* client should be prepared to treat upon the footing of payment by instalments extending over about three years, they would be prepared to negotiate again on Mr. *Hussey's* behalf."

I can conceive nothing clearer than the result of the statement which the Appellant thus makes. There were two letters, no doubt, but, as he says, both I and the vendor were at one that there was to be a payment of the purchase-money by way of instalment; we had not agreed what those instalments should be. I was ready to settle them. Your solicitor repudiated the idea that there were to be instalments, and required immediate payment of the purchase-money. Thereupon I said that that was unfair, and I was not ready to be bound by any claim of that kind, and that I would "decline the matter," which must be taken to mean decline the arrangement for the purchase, and he would be ready to treat, or to "negotiate again" as soon as Mr. *Crowdy* "should be prepared to treat upon the footing of payment by instalments." Now this is not a matter of controversy upon the demurrer; this is the attitude which the Appellant assumed at the time, and it must be taken, as against him, that that was the correct view of the facts of the case at that moment.

How, then, did the case proceed? *Weaver*, his agent, saw Mrs. *Payne*, and she wrote to him. He having reminded her of the understanding about the instalments, she at once admitted it, and in her letter said:—[His Lordship read the letter]. Now, if this could be taken as a memorandum of that part of the agreement which, up to that time, never had been settled; if this could be taken as the statement of what was wanting, and a memorandum in writing of the manner in which what was wanting was to be supplied, then the *desideratum*, the thing which was omitted in the two original letters, might be taken as supplied. But this, after all, is merely a statement referring the Appellant to the solicitor of the Respondent, and a statement of what she had desired the solicitors to do. Therefore we must look at what the solicitor did under those instructions.

Now what he did say was this. He wrote to the solicitor for the Appellant, "We have had some farther communication with our clients hereon, and are authorized to state to you that they will be willing to carry out this sale upon the following terms." And then he gives three terms with regard to the instalments. "This," (he says) "we believe is all that relates to the money payments, the other details of the contract we can settle. Let us

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hear if you are instructed to the above effect. We should add that this only binds our client on acceptance by yours." Here, again, if this had been then accepted, you would have had this added to what had already been put in writing, and you would have had the agreement completed in the way required to complete it. But was this accepted? On the contrary, a week or thereabouts, a fortnight, I think, passes over. Then the agent of the Appellant calls on the solicitor for the Respondent, and in place of accepting the terms which had been put in writing, puts in a counter proposal—a counter statement of terms—headed, "Proposal by Mr. *Thomas Hussey* for the purchase of the freehold property known as the *Mornington* estate," treating it again as still a matter of proposal. He proposes instalments to be paid in a different way, and to be accompanied with certain provisions for partial conveyance as each instalment was paid. The details are not material. "Mr. *Crowdy*," he says, "on behalf of the Defendant, went carefully through the same, and verbally agreed thereto." But even if that had been so, a verbal agreement is insufficient; there was no writing to bind Mr. *Crowdy* or his client to it.

But a few days after that Mr. *Crowdy* writes, and in place of expressing agreement with the paper, he demurs to one or two of the provisions in the counter proposal, and speaks of one serious error, which, in his ill state of health he had omitted to notice. He points out that they would not have the effect which he would desire, and he requires a change in the proposal to be made. There was no completed contract. *Crowdy* was seized with illness; he afterwards died, and nothing was done in the way of supplying what was wanting.

Now, my Lords, the conclusion I draw from that is this, that we have here the Appellant himself telling us that the two original etters, which, if you took them alone without any knowledge supplied to you of the other facts of the case, might lead you to think that they represented and amounted to a complete and concluded agreement, yet really were not a complete and concluded agreement, that there were to be other terms which at that time had not been agreed upon, that efforts were made afterwards to settle those other terms, and that these efforts did not result in a settlement of these other terms. The consequence

therefore of the whole is, that it appears to me not only that there is no note in writing, according to the *Statute of Frauds*, of that which was a completed agreement between the parties, but that there was in point of fact no completed agreement between the parties.

Earl Cairns, L.C.

My Lords, I said I would refer to the grounds upon which the case was decided in the Courts below. The Vice-Chancellor was of opinion that the two letters constituted a completed agreement, and then he looked to see whether there was any rescission of that completed agreement, and he was of opinion that there was not. As to that, I can only say that if I could arrive at the conclusion at which the Vice-Chancellor arrived, that the two original letters constituted a completed agreement, I should be disposed to agree with him and say—at all events I should be unwilling to decide in an opposite sense—that there was no rescission standing upon a memorandum of equal authority with the letters. But from what I have said, your Lordships will understand that I cannot find that there was originally in those two letters a completed agreement.

The Court of Appeal reversed the Vice-Chancellor's decision, and dismissed the action, but upon a different ground. The Court of Appeal held that the second of what I have called the first two letters, introduced in the last words of it a new term by stipulating that the sale was to be subject to the title being approved by the solicitors of the purchaser. The Lords Justices were of opinion that that constituted the solicitors the arbiters of whether the title was a good one or not, and that the vendor had not agreed to that term, making the solicitors of the purchaser the arbiters of that question. I rather infer, from the judgments of the learned Judges of the Court of Appeal, that they were disposed to look with doubt upon the question of whether, even without this, there was a completed agreement, or would turn out to be a completed agreement between the parties; but they were of opinion that this difficulty was sufficient to decide the case against the Appellant.

My Lords, I have not desired to put the opinion which I have offered to your Lordships upon that ground, and I should doubt very much myself, if it were necessary to decide it, whether the opinion of the Court of Appeal in this respect could be maintained.

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I feel great difficulty in thinking that any person could have intended a term of this kind to have that operation, because, as was pointed out in the course of the argument, it virtually would reduce the agreement to that which is illusory. It would make the vendor bound by the agreement but it would leave the purchaser perfectly free. He might appoint any solicitor he pleased —he might change his solicitor from time to time. There is no ~~directio~~ *personarum*; there is no appointment of an arbitrator in whom both sides might be supposed to have confidence. It would be simply leaving the purchaser, through the medium of his solicitors, at liberty to say from caprice at any moment, we do not like the title, we do not approve of the title, and therefore the agreement goes for nothing. My Lords, I have great difficulty in thinking that any person would agree to a term which would have that operation. But it appears to me very doubtful whether the words have that meaning. I am disposed rather to look upon them, and the case which was cited from *Ireland* would be authority if authority were needed for that view, I am disposed to look upon the words as meaning nothing more than a guard against its being supposed that the title was to be accepted without investigation, as meaning in fact the title must be investigated and approved of in the usual way, which would be by the solicitor of the purchaser. Of course that would be subject to any objection which the solicitor made being submitted to decision by a proper Court, if the objection was not agreed to.

Therefore, my Lords, although I arrive at the conclusion at which the Court of Appeal arrived, I desire to say that I am unable to arrive at that conclusion upon the same grounds, but I think it would be much more satisfactory to look at the case upon the broader ground. I think there was here no concluded agreement between the Appellant and the vendor, and therefore I submit to your Lordships and move your Lordships, that this appeal should be dismissed with costs.

LORD SELBORNE :—

My Lords, I am of the same opinion, and for the same reasons, with my noble and learned friend upon the woolsack.

I cannot agree with what appeared to be suggested by part of

the Appellant's argument, that, because two letters were written, by which the conditions required by the *Statute of Frauds* would have been satisfied, if there were nothing outside those letters to the contrary, therefore there is here such a concluded agreement as a Court of Equity ought specifically to perform, without regard to what preceded, or what followed. The observation has often been made, that a contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine that they were finally settling the terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only, and without the settlement of which the parties had no idea of concluding any agreement. I adhere to what I said, when sitting in the Court of Chancery, in the case of *Jervis* v. *Berridge* (1), that the *Statute of Frauds* "is a weapon of defence, not offence," and "does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties;" and I think it especially important to keep that principle in view when, as in the present case, it is attempted to draw a line at one point of a negotiation, conducted partly by correspondence and partly at meetings between the parties, without regard to the sequel of the negotiations, which to my mind plainly shews that terms of the intended agreement, which were of great practical importance, and were so regarded on both sides, then remained unsettled and were still the subject of negotiation between them.

LORD GORDON concurred.

Order appealed against affirmed; and appeal dismissed with costs.

Lords' Journals, 1st May, 1879.

Solicitors for Appellant: *Kynaston & Gasquet.*
Solicitors for Respondent: *James Crowdy & Son.*

(1) 8 Ch. Ap. at p. 360.

[HOUSE OF LORDS.]

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Feb. 28; *March* 3, 4, 6; *May* 5.

THE PRESIDENT AND GOVERNORS OF THE MAGDALEN HOSPITAL . . } APPELLANTS;

AND

ALFRED KNOTTS, R. M. SHAW, JAMES WATNEY, AND OTHERS . . . } RESPONDENTS.

Charity Lands—13 *Eliz. c.* 10—*Lease void or voidable*—*Statute of Limitations.*

5 C P D 373

An eleemosynary corporation is within the meaning and operation of 13 Eliz. c. 10.

A lease, of land belonging to such a corporation, not in conformity with the provisions of the third section of that statute, is therefore absolutely void.

The governors of *Magdalen Hospital* (created a corporation, for certain charitable purposes, by the 9 Geo. 3, c. 31) made, in 1783, a lease of certain land of the hospital for ninety-nine years, at the rent of "one peppercorn (if lawfully demanded)." The only covenants, on the part of the lessee, were to indemnify the governors from all taxes, &c., during the term, and to surrender the premises at its end; and, on the part of the governors, for quiet enjoyment. No act had been done until now to avoid the lease, or to interfere with the persons holding the land. In July, 1876, the governors brought an action in Chancery to recover possession of the land thus leased:—

Held, that the lease was absolutely void within the provisions of the statute 13 Eliz. c. 10. That consequently the right of the governors to re-enter on the land existed from the moment of the execution of the lease, and that right not having been sought to be enforced till now, was barred by the *Statute of Limitations*, 3 & 4 Wm. 4, c. 27, s. 2.

Per LORD SELBORNE:—If any rent, however small, had been reserved and received, it would have created the legal relation of a tenancy from year to year, and the *Statute of Limitations* could not have run.

Pennington v. *Cardale* (1) commented on.

APPEAL against a decision of the Court of Appeal.

In the year 1758 certain persons agreed to form a charity and establish a hospital for the reception, maintenance, and employment of penitent prostitutes. Lands were bought for this purpose, and exchanges took place for other pieces of land in the parish of *St. George-in-the-Fields*, in the county of *Surrey*. In 1768 an Act

(1) 3 H. & N. 656.

of Parliament (9 Geo. 3, c. 31) was passed constituting the persons who desired to form the charity into a corporation, with perpetual succession and a common seal, and authorizing them to hold lands in mortmain. On the 4th of December, 1783, one *Charles Gilbert* demised to the Appellants and their successors, &c., a piece of land lying to the north-east of their hospital, for the term of fourteen years from the 25th of March, 1783, at the yearly rent of £5, and on the same 4th of December the then president and governors of *Magdalen Hospital* executed to *Charles Gilbert* a lease of certain of their lands "not included within the site of a wall of the present hospital, or the gardens and yard thereof," for the term of ninety-nine years, at a peppercorn rent. The lands thus demised included those sought to be recovered in this action. The only covenants in this lease entered into by *Gilbert*, were to indemnify the corporation from all taxes, &c., and to yield up possession at the end of the term. There was a covenant by the lessors for quiet enjoyment. *Gilbert* entered into possession. He became bankrupt in 1793, and on the 9th of October, 1794, the president and governors demised to his assignees the same premises for a reversionary lease for fifty years, "to commence and be completed from and at the end of the said term of ninety-nine years," to be held also at a peppercorn rent, and subject to the covenants contained in the ninety-nine years' lease. In 1795 *Gilbert* and his assignees demised to the president and governors of the hospital a piece of leasehold land for fifteen years and a half, also at a peppercorn rent, both demises being recited to be made in pursuance of an agreement to that effect made in 1793. What that agreement was did not appear, nor did any explanation of the granting of these various leases appear capable of being given. The occupiers of the land, the subject of the ninety-nine years' lease, seemed to have changed more than once, and that land was now claimed by persons of the name of *Shaw* as their freehold property. *Knotts* was their tenant, in occupation of *The Tower* public-house, situated at the corner of *Tower Street* and the *Westminster Bridge Road*, and Mr. *Watney* was a mortgagee of *Knotts'* leasehold interest. No claim of rent nor any assertion of title to the property had been made by the Appellants for above eighty years, until they issued the writ in the

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present proceeding. The Appellants, on the 11th of July, 1876, commenced an action in the Chancery Division against *Knotts* to recover possession of *The Tower* public-house, alleging that under the statute 13 Eliz. c. 10, the ninety-nine years' lease ought to be declared void as an improvident alienation of the lands of the hospital, and they asked to have an account of the rents and profits from the date of the issuing of the writ, and for farther relief. The *Shaws* and Mr. *Watney* claimed to defend, and were made Defendants accordingly for their respective interests.

All the Defendants relied for their defence on the *Statute of Limitations* and on that ground demurred to the statement of claim.

The demurrer was, on the 11th of December, 1876, argued before the Master of the Rolls, who, following what he believed to be a decision binding on him, held that the lease was not originally void but only voidable at the option of the governors of the hospital, that the present governors had, by bringing the action, exercised that option, and avoided the lease; that the *Statute of Limitations* did not begin to run till action brought, and therefore did not apply to the case (1). The case then went on to trial before Mr. Justice *Fry*, who followed the ruling of the Master of the Rolls as to the *Statute of Limitations*, and by his judgment on the 13th of November, 1877, declared that the ninety-nine years' lease was void so far as it affected *The Tower* public-house, and adjudged the Plaintiffs to recover possession thereof, and £105 for mesne profits as from the date of the action brought. On appeal it was ordered, on the 16th of April, 1878, that the judgment of the Court below should be discharged, and that the action should be dismissed with costs, the Court of Appeal holding that the hospital, although an eleemosynary and not an ecclesiastical corporation, was within the 13 Eliz. c. 10 (2), that the lease was voidable

(1) 5 Ch. D. 175.

(2) The title in the Statute Book is: "Fraudulent deeds made by spiritual persons to defeat their successors of remedy for dilapidations shall be void, &c." The recital is: "Where divers and sundry ecclesiastical persons of this realm, being endowed, &c., have suffered the edifices and buildings of their livings to go to ruin and decay, and have made deeds of gift and colourable alienations, &c., to defeat and defraud their successors, be it therefore enacted," &c.

Sect. 3: "And for that long and unreasonable leases made by colleges,

under the 3rd section of that statute, and that the right to recover possession of the land accrued to the governors of the hospital, not at the time of action brought, but at the time of the execution of the lease, and that consequently the right of action was now barred by the effect of the *Statute of Limitations*. The judgment of the Court below was, therefore, reversed, and judgment ordered to be entered for the Defendants (1).

This appeal was then brought (2).

Mr. *Cookson*, Q.C., and Mr. *Davey*, Q.C. (Mr. *Decimus Sturges* was with them), for the Appellants:—

The lease here was made by persons at the time competent to make it, and the lessee, under whom, in fact, the Respondents

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deans and chapters, parsons, vicars, and others having spiritual promotions, be the chiefest cause of the dilapidations and the decay of all spiritual livings and hospitality, and the utter impoverishment of all successors, incumbents in the same: Be it enacted, that from henceforth all leases, gifts, grants, feoffments, conveyances, or estates to be made, had, done, or suffered by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, *master or guardian of any hospital*, parson, vicar, or any other having any spiritual or ecclesiastical living, or any houses, lands, tithes, tenements, or other hereditaments, being any parcel of the possessions of any such college, cathedral, church, chapter, hospital, parsonage, vicarage, or other spiritual promotion, or any ways appertaining or belonging to the same, or any of them, to any person or persons, bodies politic or corporate (other than for the term of one and twenty years, or three lives from the time as any such lease shall be made or granted, whereupon the accustomed yearly rent, or more, shall be reserved and payable yearly during the said term), shall be utterly void and of none effect, to all intents, constructions, and purposes; any law, custom, or usage to the contrary anywise notwithstanding."

The 14 Eliz. c. 14 recites the 13 Eliz. c. 10, and the enactment therein that all leases, &c., made by any of the persons therein mentioned, and among them the "master or guardian of any hospital" for more than "one and twenty years, or three lives, in manner and form as is mentioned in the said Act, should be utterly void and of none effect," and then enacts and declares "That these words, *master or guardian* of any *hospital* mentioned in the said former Act, were intended and meant of all hospitals, *maisons Dieux*, bead houses, and other houses ordained for the sustentation or relief of the poor, and so shall be expounded, declared, and taken for ever."

(1) 8 Ch. D. 709.

(2) When this case was called on Lord *Hatherley* intimated his intention to take no part in the hearing, as he was himself one of the governors of the hospital. His Lordship accordingly withdrew.

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claim, entered into possession in virtue of it. The Respondents must therefore be considered in the light of tenants to the Appellants, and, being so, they cannot dispute the Appellants' title. The lease itself is voidable, but not void, and only voidable, perhaps not at the pleasure of those who made it, but certainly of their successors. Now that their successors have thought fit to declare their intention to avoid it, which they have done by means of this action, the lease is avoided and the Appellants are entitled to recover. They alone could avoid it, and by this proceeding they have done so. *Kemp* v. *Westbrook* (1), *Jones* v. *Carter* (2) and *The Dean and Chapter of York* v. *Middleborough* (3), clearly established that to be the principle of the law. In the last-named case the Dean and Chapter of *York* were the grantees, from the Crown, of a rectory, given them for the maintenance of a grammar school. They made an arrangement by which their lessee, and the lord of the manor in the district where the rectory was situate, were to pay them a perpetual composition in lieu of tithes, and the dean and chapter entered into covenants to carry that arrangement into effect. The arrangement was in actual operation above a century, but at the end of that time, the dean and chapter, having then the rectory in their own hands, refused any longer to receive the composition, and the Court held that they were not bound to receive it, but were entitled to the tithes. So in *Moore* v. *Clench* (4) the Court treated a lease of this kind as voidable, and incapable of being enforced against the grantors, so soon as they had expressed their will no longer to be bound by it. *Pennington* v. *Cardale* (5) expressly declares such leases as this to be not void but voidable, and in *Davenport* v. *The Queen* (6) that rule of construction was applied to a colonial statute in terms similar to the *Statute of Elizabeth*.

The lease might not have been avoided by the original grantors while the corporation remained the same as at the time of the grant, but it could be avoided when the persons of the corporation were changed. There were many cases of that kind to be found

(1) 1 Ves. 278.
(2) 15 M. & W. 718, 724.
(3) 2 Y. & J. 196.
(4) 1 Ch. D. 447.
(5) 3 H. & N. 656.
(6) 3 App. Cas. 115. See also *Smith* v. *The Queen*, 3 App. Cas. 614; and *Fisher* v. *Tully*, Ib. 627.

in *Bacon's* Abridgment (1). In some of them it was said that the statute was made for the benefit and protection of the successors, and of course such successors might allow the lease to run on, or could avoid it at their pleasure. Till avoided, the persons in possession stood in the relation of tenants, for "the law will refer possession to a rightful rather than to a wrongful title": *Doe* d. *Batten* v. *Murless* (2); and the mere non-receipt of rent from them would not constitute a bar to the rights of the landlord, except only so far as to limit the number of years within which overdue rent could be sued for.

Statutes of this kind were remedial statutes, and must not be construed strictly: *Edwards* v. *Dick* (3), where the 9 Anne, c. 14, was not so construed. That statute declared all bills, &c., given for gaming debts to be absolutely void, but in that case a bill of that sort having got into the hands of a holder for value, he was allowed to recover. The general object of the statute was alone considered; and so it ought to be here.

The lease now in question was good at law, and even under this statute could only be avoided at the will and by the act of the lessors. It was not therefore like the leases in the case of *Magdalen College* v. *The Attorney-General* (4), for there the leases were utterly void, and the real question was, not only by whom, but against whom, any proceeding was to be taken. The leases being void, the right of entry was perfect, and the statute attached from that time. Here the lease was only voidable at the will of the lessors, which, till now, had never been formally declared. That case, therefore, and those founded on it, were unlike the present, and did not apply.

The Dean and Chapter of Westminster's Case (5), *Co. Litt.* (6), *Hunt* v. *Singleton* (7), *The Lincoln College Case* (8), *Lyn* v. *Wyn* (9), *Carter and Claycoles' Case* (10), *Archbold* v. *Scully* (11), *Doe* v. *Williams* (12), *Garnett* v. *Bradley* (13), *Dwarris* on

(1) Tit. Leases, H.
(2) Per Lord *Ellenborough*, 6 M. & S. 112.
(3) 4 B. & Ald. 212.
(4) 6 H. L. C. 189.
(5) Carter, 15.
(6) 45 a.
(7) Cro. Eliz. 564.
(8) 3 Co. Rep. 60 a.
(9) Orl. Bridg. Rep. 122.
(10) Leon. 306.
(11) 9 H. L. C. 360.
(12) 6 B. & C. 41.
(13) 3 App. Cas. 944.

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Statutes (1), *Doe* v. *Burrell* (2), *Rickman* v. *Garth* (3), and *Hayward* v. *Abbot of Keinsham* (4), were cited and commented on.

Sir *H. M. Jackson*, Q.C., and Mr. *Cozens-Hardy*, appeared for *Knotts* and *Watney*, and Mr. *C. M. Warmington* and Mr. *T. N. Hilbery*, for the *Shaws*.

Sir *H. M. Jackson* and Mr. *Warmington* addressed the House:—

Magdalen Hospital was a charity such as came within the description in the Statutes of *Elizabeth*, and the provisions of the 13 Eliz. c. 10, must therefore be applied to leases granted by the governors of that charity: *The Attorney-General* v. *Glyn* (5). If they were so applied, the lease of 1783 was plainly not voidable only, but actually void. The words of the statute were express. And the decisions had been in conformity with them: *The Collegiate Church of Southwell* v. *The Bishop of Lincoln* (6) was a direct authority, and the case there was all the more like the present, for the lease was made, as here, by a corporation aggregate without a head. Nor could this lease be held good under the 9 Geo. 1, c. 31, which incorporated the founders of the charity; for though that Act, for the benefit of the hospital, gave the founders ample powers to make exchanges of lands, and declared that all rights of common existing over such lands, when obtained by exchange, should be for ever extinguished; it said not one word about granting leases for building or otherwise. And there was little doubt that the real explanation of this lease was, (though no documents were now capable of being produced to prove it,) that these lands had been given in exchange for others more convenient for the purposes of the hospital, and that in that way the peppercorn rent, and the total absence of subsequent interference on the part of the governors of the hospital, were to be accounted for. So far as now appeared, the long possession of the Respondents had been that of persons in whom the freehold was vested, and there was nothing to justify the pretence of title on the part of the Appellants.

(1) Page 159.
(2) 12 Q. B. 1011, n.
(3) Cro. Jac. 173.
(4) Dyer, 46 b.
(5) 12 Sim. 84.
(6) 1 Mod. 204; 2 Mod. 56.

If the lease was void, then it was clear that the right to re-enter arose at the moment it was granted, and the provisions of the 3 & 4 Will. 4, c. 27, therefore formed a complete answer to the present claim.

The cases cited for the Appellants were commented on, and the following were mentioned in addition: *The Attorney-General* v. *The Foundling Hospital* (1); *Dumper* v. *Syms* (2); *Rumball* v. *Murray* (3); *Morrice* v. *Antrobus* (4); *Roe* d. *Berkeley* v. *Archbishop of York* (5).

THE LORD CHANCELLOR (Earl *Cairns*):—

My Lords, the facts of the case out of which this appeal arises are stated by Lord Justice *Thesiger*, in delivering the judgment of the Court of Appeal, with so much care and accuracy that I do not propose to repeat them, but I will at once approach that which is the main question in the case. Is the claim of the Appellants to recover the premises known as the "*Tower*" public-house, in the parish of *St. George-the-Martyr*, in the county of *Surrey*, barred by the *Statute of Limitations?*

I may, in the first place, say that I entertain no doubt that the Appellants are a hospital within the meaning of the 14 Eliz. c. 14, and therefore also of the 13 Eliz. c. 10. Independently of the decision in the case of *The Attorney-General* v. *Glyn* (6) it appears to me to be clear that upon the wording of the 3rd section of the later statute an eleemosynary corporation like that of the Appellants is distinctly brought within the operation of the enactment. This being so, it is too clear for argument, and indeed it was not disputed, that the lease granted by the charity on the 4th of December, 1783, of the property in question, is a lease which is rendered invalid by the operation of the statute. So far as anything appears upon the face of the lease, it is an alienation of the charity estate for ninety-years, which plainly could not be supported.

The question then arises, was the lease voidable or void? The

(1) 2 Ves. J. 42.
(2) Cro. Eliz. at p. 816; 1 Sm. L. C. 25.
(3) 3 T. R. 299.
(4) Hardr. 325.
(5) 6 East, 86.
(6) 12 Sim. 84, at p. 87.

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Lords Justices in the Court of Appeal, considering themselves bound by authority in this respect, have treated the lease as voidable; but, treating it as voidable, have held that the right to enter and avoid it, accrued to the hospital immediately after the lease was made, and was therefore barred at the end of twenty years under the 2nd section of the 3 & 4 Will. 4, c. 27. My Lords, I do not think it necessary to examine the reasoning by which the Court of Appeal arrived at this construction of the *Statute of Limitations*, or to say how far I should be prepared to concur in it, because I must submit to your Lordships that this lease was, *ab initio*, not merely voidable but void.

The words used by the Legislature in the Statute of *Elizabeth* are precise, and as strong as it is possible to make them. The statute declares that every lease, such as is the one before your Lordships, shall be "utterly void and of none effect to all intents, constructions, and purposes, any law, custom, or usage to the contrary, anyways notwithstanding." The onus lies, as it seems to me, upon those who would cut down or qualify the effect of these words to shew some ground, either from the nature of the case, or from authority, for doing so. As to the character of the evil which it is sought by the statute to prevent, it is clear that in the case of an eleemosynary corporation, the whole property of which is devoted to charity, and where the office-bearers and other members of the corporation have no personal interest whatever, the object must be to make the property of the corporation absolutely inalienable, in any way other than by the particular form of lease which is authorized. There is no intention to protect a successor against a predecessor; there is no ground for admitting an intention that individual office-bearers of the corporation granting the lease should be bound, but that their successors should be free either to affirm or to disaffirm it. The intention is to condemn the lease as a wrong and a void thing, even though every member of the corporation should have committed himself to it, and should be anxious to maintain it.

My Lords, these considerations shew how inapposite, as applied to these Acts of Parliament, is any analogy drawn from the ordinary stipulation between lessor and lessee, that if the lessee breaks certain covenants the lease shall be void. The object in such a

case is to give the lessor an opportunity of terminating the lease if he is disposed to do so, but not to terminate it against his will or against his interest; and to hold that the lease must become void, even against the lessor's will, would enable the lessee to get rid of an onerous lease by wilfully breaking the covenant contained in it.

So also with regard to cases (of which a great many were cited at your Lordships' bar), where a lease, not warranted by the Statutes of *Elizabeth*, is made by an ecclesiastical corporation having a head, and where it has been held, while the same head continues, not indeed that the lease is voidable, but that it cannot be avoided even if the corporation desires it, but that after the death of the head, the corporation, as constituted under his successor, may enter and avoid the lease, but may, on the other hand, so act as again to stop itself from so doing. A large number of these cases is collected in *Bacon's* Abridgement, title "Leases." There may be some difficulty in understanding how some of these cases, with regard to ecclesiastical corporations with a head, came originally to be decided as they were; probably they proceed on the principle of a personal estoppel by reason of a personal interest in the head of the corporation; but they appear to me to have no application to the case before your Lordships.

There is, indeed, a case mentioned in *Bacon's* Abridgment (1) under this title—the case of the *Collegiate Church of Southwell*, reported in Modern Reports (2) and elsewhere—which has some application to a corporation like the Appellants, but it is an authority that the lease would be void and not voidable. It runs thus: "Where there is a chapter that hath no dean, as the chapter of the *Collegiate Church of Southwell*, their grants or leases made by them contrary to 13 Eliz. c. 10, are void *ab initio* against themselves, and so the leases or grants by any other corporation aggregate who have no head or principal person, for they must be either void *ab initio* or good for ever, because they" (that is to say, the corporation) "continue always the same, and one has no superiority or power more than another."

To hold, in opposition to the precise words of the statute, that a lease by a corporation like that of the Appellants was only

(1) Tit. Lease, H. p. 119, 6th Ed. (2) 1 Mod. 204; 2 Mod. 56.

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voidable, would not merely be unmeaning, for to say that a lease is voidable implies a right to affirm, which the corporation would not possess, but it might also inflict serious injury on the corporation. A valuable estate of the corporation might be alienated in utter recklessness or something worse, and when the corporation was put in motion to reclaim it, then, as the grant was valid until avoided, the right to mesne profits would not exist.

The Court of Appeal, as the authority for the view that the lease is voidable only, refers to what is stated as a principle of the decision, and not a mere *obiter dictum*, in *Pennington* v. *Cardale* (1). I cannot agree that it was any necessary part of the decision in *Pennington* v. *Cardale* (1) that the lease was voidable. The question in that case related to the meaning of an exception of certain premises out of a lease granted by a dean and chapter in 1849. The excepted premises were described as rents reserved in any building leases granted by the dean and chapter, and the Court held that these words, upon the whole context, meant leases which *de facto* had been granted by the dean and chapter, whether interests were lawfully created by them or not. The inquiry whether these leases were void or voidable was immaterial. It is true that, in delivering the judgment of the Court, Mr. Baron *Martin* says of a lease granted by the dean and chapter contrary to the statute, "It seems quite clear from the authorities cited upon the argument that this lease was not void, but voidable only." These observations do not appear to me to have been necessary for the decision of the case; and even if they were accurate, they did not relate to the effect of leases or grants by a corporation such as that of the Appellants; but they referred to the class of cases relating to ecclesiastical corporations with a head, of which I have already spoken.

My Lords, holding, as I do, that the lease of 1783 was absolutely void, the Respondents, or those whom they represent, must be taken to have been in possession of the property from 1783 without any title whatever; and not having paid rent to the Appellants, or in any other way entered into the relation of tenants, there is nothing to prevent the full operation of the 2nd section of the *Statute of Limitations*, and the right of the

(1) 3 H. & N. 656.

Appellants to recover the land is, in my opinion, effectually barred. I shall therefore move your Lordships that the judgment of the Court of Appeal be affirmed, and the appeal dismissed with costs.

LORD SELBORNE:—

My Lords, I am of the same opinion, and I only desire to make two observations.

The first is, that the explanation of the doctrine laid down in the authorities as to leases by deans and chapters, and by colleges in the universities, is probably to be found in the fact that they were corporations coming within the original restraining Act of Queen *Elizabeth*, the governing members of which received the rents reserved on their leases for their own benefit; and that the succession in them, of one head having a principal share in that beneficial interest, after another, was thought (though by a process of reasoning which I cannot think accurate) to justify the Courts in holding that the declared policy of that statute was satisfied so long as those particular successors were protected. That, however, cannot apply to a corporation under the government of persons of whom none has a beneficial interest; and the *Southwell Case* (1) is, *à fortiori*, an authority for not extending that doctrine to such a corporation.

The other observation which I wish to make is, that the present case is one for which there was, probably, never any precedent, and which is never likely to be followed by another similar to it—a long term having been attempted to be granted by a charitable corporation at a peppercorn rent. If any rent had been reserved and received, however small, the legal relation of a tenancy from year to year would have been created, and the *Statute of Limitations* could not have run.

LORD GORDON:—

My Lords, I concur in the judgment proposed.

I am of opinion that the provisions of the *Statute of Elizabeth* apply to the *Magdalen Hospital* and to the lease in question. And

(1) 1 Mod. 204; 2 Mod. 56.

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PRESIDENT AND GOVERNORS OF MAGDALEN HOSPITAL *v.* KNOTTS.

that being so, I can entertain no doubt that the lease is not only voidable, but that it was from the beginning void. The terms of the Act are, I think, so express as to leave no room for any other construction.

If the lease was *ab initio* void, it follows that the Respondents and their predecessors have been all along in possession of the property without any title; and as they have not paid rent to the Appellants, or in any other way entered into the relation of tenants, I think that the 2nd section of the *Statute of Limitations* applies, and that all rights on the part of the Appellants are effectually barred.

I think, therefore, that the result arrived at by the Court of Appeal (though on different grounds) is right, and that the judgment should be affirmed.

Decree appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 5th May, 1879.

Solicitors for Appellants: *Wordsworth, Blake, & Co.*

Solicitors for Respondents: *Pownall, Son, & Co.; Curtis & Betts.*

[HOUSE OF LORDS.]

MUIR AND OTHERS, TRUSTEES . . APPELLANTS;
CITY OF GLASGOW BANK AND LIQUIDATORS . . . . . RESPONDENTS.

H. L. (Sc.)
1879
April 7.

Joint-Stock Banking Company—Winding-up—Personal Liability of Trustees—Construction of Contract—Companies Act, 1862 (25 & 26 *Vict. c.* 89).

A. and *B.*, trustees for *C.* and *D.*, accepted, as part of a trust estate, stock in a Scotch banking company. By the deed of co-partnership, there was to be no limit whatever to the shareholders' liability. They signed the deed of transfer "as trust disponees," and accepted the stock "as trust disponees foresaid, subject to the articles and regulations of the said company in the same manner as if they had subscribed the contract of co-partnership." Their names and addresses were entered in the stock ledger (the register of shareholders), followed by the words "as trust disponees" for *C.* and *D.* The individual names of *A.* and *B.* did not appear in any list of shareholders issued to the public.

The bank suspended payment with immense liability. The liquidators placed *A.* and *B.* on the first part of their list of contributories as liable to calls "in their own right." In a petition to rectify the list of contributories, by transferring the names of *A.* and *B.* from the first part to that part entitled "second part—contributories as being representatives of others":—

Held, affirming the decision of the Court below, that the trustees, *A.* and *B.*, were partners of the company, and as such were personally liable for payment of all calls made on them in respect of the said stock.

Held, also, that a distinction between partners, with limited and unlimited liability, was repugnant to the whole nature of the deed of partnership.

Lumsden v. *Buchanan* (4 Macq. 950; Court Sess. Cas. 3rd Series, vol. ii. p. 723), undistinguishable.

Per LORD CAIRNS, L.C.:—The words "as trust disponees" were added to the names of the trustees to mark the stock as property of the particular trust; to shew that the stock was held on a joint account with a right of survivorship; and possibly with a third purpose—to give a peculiar facility under the law of *Scotland* to a trustee to retire from the trust.

Per LORD PENZANCE:—Where trustees join in a contract of partnership for trading purposes, the mere designation of them as trustees will not exempt them from the same personal liability as is undertaken by the other shareholders.

Per LORD BLACKBURN:—Trustees, not created by a statute, are not by the law of *Scotland* a body corporate or a *quasi* corporation.

THIS was an appeal from a judgment of the First Division of the Court of Session. It raised the important question whether

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the Appellants, *William Muir*, *William Thomson*, *John Boyd*, and *J. L. Boyd*, trustees, who had accepted a transfer "as trust disponees" of certain shares in the *City of Glasgow Bank*, an unlimited company, were personally liable to pay out of their private property all calls made in respect of those shares, or whether they were only liable to the extent of the trust-funds.

The *City of Glasgow Bank* was a joint stock partnership, created in 1839. In 1862 it was registered as an "unlimited company" under the *Companies Act* (25 & 26 Vict. c. 89) of that year; the partnership contract being registered as the articles of the company.

Mr. *John Murdock*, of *Edinburgh*, died in June, 1873, possessed of £5000 of this bank stock, and leaving a trust disposition and settlement executed in 1843. His whole estate was valued at £70,415 5*s.* 3*d.*

A question having arisen whether the bank stock would pass under the trust disposition, his two daughters, Mrs. *Syme* and Mrs. *Boyd*, the beneficiaries under the deed, made out a title to his estates as executrices-dative *quâ* next of kin, and the confirmation in their favour having been produced to the bank, the £5000 stock was transferred to their names in the stock ledger.

About the same time Mrs. *Syme* and Mrs. *Boyd* purchased £1000 of new stock issued by the bank, and this being entered in the same account in the stock ledger as the £5000, they appeared on the register for a total of £6000 stock. On the 20th of September, 1873, Mrs. *Syme*, who was a widow, and Mrs. *Boyd*, with the consent of her husband *John Boyd*, executed a trust disposition by which they assigned, conveyed, and made over to and in favour of the Appellants and the acceptors, or acceptor, survivors or survivor of them, or to such other person as might be assumed into the trust, a majority being a quorum, and to their lawful successors in office as trustees and trustee, for the ends, uses, and purposes contained in the trust disposition and settlement executed by their father, all the real and personal estate to which they had right as next of kin and executrices dative of their father, the late *John Murdock*. The trustees had also, *inter alia*, full power to hold or sell such stocks as they might see fit. The Appellants were the survivors of those appointed trustees by Mr. *John Murdock's* settlement of 1843.

On the 27th of January, 1874, a transfer of the £6000 stock was executed by Mrs. *Syme* and Mrs. *Boyd*, with the special advice and consent of her husband, to the Appellants in order that their legal title to the stock might be completed. The transfer assigned, transferred, and made over to *William Muir* and his three co-trustees (naming them) "the trust disponees in a deed of conveyance in trust granted by us in favour of the said *William Muir*, &c., dated and ratified the 20th day of September, and recorded in the books of council and session the 28th day of October, both in the year 1873, and their successors and assigns whomsoever, £6000 sterling of the consolidated capital stock of the *City of Glasgow Bank Company*, with the whole interests, profits, and dividends that may arise and become due thereon, the said *William Muir* (and three others named), as trust disponees foresaid, by acceptance hereof, being, in terms of the contract of copartnership of said bank, subject to all the articles and regulations of the said company, in the same manner as if they had subscribed the said contract: And we, the said *William Muir* (and three others named), as trust disponees foresaid, do hereby accept of the said transfer on the terms and conditions above mentioned; and we consent to the registration hereof and of said contract for preservation and execution," &c., signed *Mary Syme, Sophia M. D. Boyd, John Boyd, William Muir, William Thomson, John Boyd, J. L. Boyd.*

The ordinary transfer form of the *City Bank* stock ran, "Hereby sell, assign, transfer, and make over to and in favour of the said , heirs, executors, successors whomsoever," &c.

The draft transfer was submitted to the directors, passed by them, and the above transfer identical with the draft was prepared by an officer of the bank, and having been executed by the parties was sent back to the bank for registration. The £6000 was then transferred to the Appellants as trust disponees; an entry being made in the stock ledger (the alleged register of members of the bank) giving the names and addresses of the Appellants followed by the words "as trust disponees of Mrs. *Mary Murdock*, or *Syme*, 14, *Great King Street, Edinburgh*, and Mrs. *Sophia Maria Darby Murdock*, or *Boyd*, wife of the said *John Boyd*, trust disponees of Mrs. *Mary Murdock*, or *Syme*, and another."

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A stock certificate was also issued by the bank to the Appellants in these words:

Glasgow, 4th February, 1874.

These certify that the trust disponees of Mrs. *Mary Murdock*, or *Syme*, widow of the late *Francis Darby Syme*, and residing at 14, *Great King Street, Edinburgh*, and Mrs. *Sophia Maria Darby Murdock*, or *Boyd*, wife of *John Boyd*, residing at 27, *Melville Street, Edinburgh*, have been entered in the books of this company as the holders of six thousand pounds consolidated stock.

And the back of the certificate was indorsed thus:

William Muir, Esquire, of *Inistrynich, Argyleshire*, merchant in *Leith*; *William Thomson*, esquire, of *West Binny, Linlithgowshire*; *John Boyd*, Esquire, residing at No. 27, *Melville Street, Edinburgh*; and *James Laurence Boyd*, Esquire, Solicitor, Supreme Courts of *Scotland*, and residing at No. 1, *Regent Terrace, Edinburgh*, as trust disponees within mentioned.

On the 27th of January, 1874, a mandate was granted by the Appellants authorizing the dividend warrants to be made payable to *John Boyd*, one of themselves. These warrants were made out as for dividends due on "£6000 consolidated stock, standing in the name of the trust disponees of" Mrs. *Syme* and Mrs. *Boyd*. Neither in the statutory returns made to the Inland Revenue, nor in the annual returns to the Registrar of Joint Stock Companies, nor in any of the published lists of shareholders, did the individual names of any of the Appellants appear; the stock was simply described as being held by the trust disponees of Mrs. *Syme* and Mrs. *Boyd*.

The material clauses of the *City of Glasgow Bank* contract of co-partnership are as follows:

Clause (4.) The parties do hereby bind themselves respectively to contribute and pay, when required, the sums of money corresponding to the number of shares of the said stock subscribed by them, as the same are specified in the testing clause of these presents, and are likewise *in majorem evidentiam*, adjected to their signatures, and which several sums of money are held to be herein repeated.

(5.) The said partners shall have right to the profits and be liable for the losses, and bound to relieve each other, of all the debts and engagements of the company, in the proportion of their respective interests or shares in the said capital stock.

(6.) Any person holding a share of the said capital stock, whether as an assumed subscriber, or as a purchaser, heir, or other representative of such subscriber, shall be entitled to all the rights and subject to all the liabilities of an original partner of the said company.

(13.) . . . "And that in every case when companies and partners hold part of

the capital stock of this company, only one of the partners of such company shall be entitled to vote and act, and his name shall be entered in the books of this company accordingly; and no person holding shares *pro indiviso* with another, nor any factor or trustee on the bankrupt estate of a partner, nor any trustee, tutor, curator or factor for a partner, shall be entitled to attend any meeting of the company.

(14.) Declaring that no trustee or assignee of any bankrupt partner, or the tutor, or curator, or other guardian, or trustee of any pupil, minor, or incapacitated partner, shall be entitled to vote by proxy: That no factor, trustee, commissioner, tutor, guardian, agent, or other person, not a partner, shall be entitled to attend any meeting, or to interfere with the affairs of the company . . . Declaring further, that whenever any shares shall be vested in two or more persons jointly, or in a company, or corporation, the votes in respect of such shares must be given by the person whose name stands first in the said book called the "Stock Ledger," so that in no case more than one person shall vote for or represent such persons holding shares jointly, or such companies or corporations . . .

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By sects. 21 and 22, ordinary directors might manage the business of the company. And clause 31 gave the directors power to allot shares. The company having power by clause 32 to purchase their own stock.

Post 572

(33.) The foresaid capital stock, and profits accruing thereon, shall be transferable by the partners respectively, and shall transmit and descend as personal property to their executors, or representatives, by testament . . . Declaring that every partner who shall dispose of his share of the company's stock, agreeable to the regulations herein-before and after written, or who shall cease to have an interest in the concern through forfeiture, or otherwise in terms hereof, shall be entitled to relief of the whole debts owing by the company, and of all obligations granted for the same, and in general of every prestation incumbent on him as a partner of the company, and the other partners shall be hereby bound to relieve him, his heirs and successors, of the same; but such partner shall be entitled to gain no other relief than that contained in this obligation. And the party or parties acquiring shares so disposed, or otherwise coming in right of the party or parties so ceasing to have interest, shall have no claim whatever against the other partners of the company, whether prior or posterior to the period of such party or parties becoming purchasers; but he shall take and assume the place and liability of his author, ancestor, or other cedent, and become subject to all the obligations incumbent upon him.

Clause (34) Provided that any gratuitous assignment of stock should be effectual if sanctioned by the directors, but if they saw cause to withhold their sanction from such transfer, they could order such stock to be sold in manner provided in the case of partners becoming bankrupt. Also no sale or transference *inter vivos* for an onerous consideration was to be effectual until the name of the purchaser and the price accepted was sent into the

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directors; they having three days to decide whether they would purchase the stock for the company itself or not. Clause 35 enacted that if any partner became bankrupt, he should cease to exercise the right of a partner, the directors having the right to insist on his stock being sold, or else to retain them for the company, accounting to the bankrupt partner for the proceeds or value.

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(36.) And also in case a partner deceasing, although no diligence had been or should be used against his estate, and of no party choosing to represent such deceased partner by confirming executor, or otherwise assuming his estate within twelve calendar months after his decease, it shall be in the power of the said ordinary directors of the company, either to sell and dispose of the shares so arrested, attached, or not taken up by a legal title, on the lapse of the said respective periods of twenty days and twelve months, or to retain and appropriate the same to the use of the company.

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(37.) Where the shares of any partner are transferred, conveyed, or sold, in terms of the above Articles, and that either by the partners or directors, the deed of transference thereof shall be prepared by such person as the ordinary directors may appoint at the head office in *Glasgow*, in such form and terms as the said directors may from time to time appoint.

(38.) The said deed of transference, as also every assignment of shares in security, or *mortis causa*, and confirmations thereof by right of succession, shall, after being completed, be recorded in a book to be kept for that purpose, and such deeds, transference, assignments, and confirmations, shall be delivered or returned to those in right of the same, after having marked thereon a certificate of the registration thereof; and it is hereby declared that the production of such writings to the said manager or ordinary directors for the purpose of registration, shall, *ipso facto*, infer the acceptance of the capital stock therein specified, and the liabilities of the parties having right to the same as partners of the company, but it is hereby declared that no purchaser or other assignee of, or successor to, shares so acquired shall be recognised as a partner until the writing constituting his title is recorded in the books of the company in manner above specified; . . . it being, however, always understood that the assignee, or heir, or executor to such selling, assigning, or deceasing partner, shall take the precise place of his author or ancestor, and shall have no claim on the other partners for relief from debts contracted or obligations entered into, previous to his becoming a partner.

(39.) The name, designation, and place of abode of every partner, together with the number of shares held by him, or her, shall, from time to time, be entered in a book to be kept for that purpose, to be called the "stock ledger," and every partner who shall at any time change his name or place of abode, or being a female, shall marry, and the trustee or assignees of any partner who shall become bankrupt, and the representatives of any partner deceasing, shall, immediately after the occurrence of such events, leave a written notice at the place of business of the company in *Glasgow*, stating his or her name and place of abode; and when a female partner shall have been married, the name and place of the abode of her husband; and when the name of such partner, with the number of shares held by him or her of the capital stock, shall be so made in said stock ledger, and signed by the officer of the company duly authorized so to do, coupled

with an entry in the stock ledger, of the partner having paid the first call or instalment subscribed for by him or her, such entries shall be held as conclusive evidence of the partnership to the extent subscribed for and appearing by said entries: but, in case further evidence is required, the directors shall cause a certificate, signed by the manager, to be delivered to such partner as shall require the same, specifying the shares to which he or she is entitled in the capital stock of the company, but that always on such partner requiring said certificate, at one and the same time paying any fee or other charge exigible therefor, and which certificate shall be in the following terms:—

"CERTIFICATE.

"*City of Glasgow Bank*,
"*Glasgow*, 18

"These certify that has, of this date, been entered in the books of this company as a holder of shares.

"Entered, "Manager.

And upon the shares or part of them, referred to in such certificate, being sold' the said certificate shall be given up to be cancelled, and a new certificate shall be issued to the new partner, if desired, and if any shares included in the certificate given up be retained by the old partner, a new certificate in respect thereof shall, if desired, be issued.

(40.) The person or persons, companies or corporations, whose names shall at any time stand in the said stock ledger containing the list of partners of the company, whether as original or assumed partners, shall be deemed and taken to be the proprietors of the several shares standing in the said ledger in their respective names, and shall be liable to the payment of every call or calls for instalments of capital stock to be made thereon, and to all actions, suits, obligations, forfeitures, and penalties, and shall be entitled to the whole profits, and liable for all the losses to which the original proprietors of shares in the company are subject, liable, and entitled to by these presents, and the names entered in the said stock ledger, and the amount of shares annexed thereto shall be the sole evidence receivable at any meeting of the partners as to the right of voting at said meeting.

(43.) The ordinary directors of the company shall have full power, and they are hereby empowered, to purchase for behoof of the company, any of the shares of the capital stock which may be offered for sale, either privately or by public roup, whether in virtue of the provisions contained in these presents, or otherwise, and that at such price and prices as they shall consider of advantage to the company. . . .

(46.) . . . If it shall at any time appear, on balancing the company's books, that a sum equal to the whole of the reserved surplus fund, and also to one-fourth part of the paid-up capital stock of the company, has been lost in the prosecution of the business of the company, a special general meeting of the shareholders shall be called by the manager, under authority of the ordinary directors, and the company shall thereupon be dissolved, unless a majority of two-thirds in value of the shareholders, personally or by proxy, present at such meeting, shall determine otherwise, and pay up to such partners as may be disposed to retire, within one calendar month from the date of said meeting, such value for their shares as shall be agreed upon, not exceeding the value as appearing from the last

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previous balance of the company's books; declaring, that in such case, the responsibility of the retiring partners shall wholly cease and determine; and declaring that in no other event, and in no other manner shall the company be dissolved, except with the consent and approbation of at least two-thirds of the whole ordinary directors for the time being, given at a special meeting, and also with the consent and approbation of partners holding collectively at least two-thirds of the whole capital stock of the company.

(54 and last.) . . . The parties hereto, and their heirs and successors, shall be bound and obliged to observe and perform their respective parts of the present contract, and to abide by and implement the regulations and by-laws of the company in force for the time, in the whole clauses and articles thereof, in good faith, and according to the true intent and meaning of the same.

The *City of Glasgow Bank* suspended payment with immense liabilities on the 2nd of October, 1878, and a resolution to wind up voluntarily was passed on the 22nd of the same month of October. The liquidators made up a list of contributories of the bank on the 7th of next November, and on the 13th they made a first call of £500 on each £100 stock. The liquidators entered the Appellants in the first part of their list as contributories "in their own right" in respect of the £6000 stock. The intent of this was to make the Appellants personally answerable for calls to the full extent of their private means. The Appellants thereupon petitioned the First Division of the Court of Session for alteration of the list by transferring the Appellants' names to the second part entitled, "second part, contributories as being representatives of others," with the object of having their liability limited and defined as only an obligation to make the trust estate forthcoming.

The Appellants averred *inter alia* in their petition that they never agreed to become individually members or partners of the said *City of Glasgow Bank*. They only accepted the transfer in their representative capacity as administrators of the trust estate. Their instructions to the officers of the bank were to prepare a transfer in their favour in that capacity, and the transfer so prepared and passed by the directors bears to be in favour of them as trustees, and their successors and assigns whomsoever, and the obligation therein contained bears to be undertaken by the Petitioners as trust deponees. The entry in the stock ledger is qualified in the same terms.

It was the regular practice of the *City of Glasgow Bank*, in virtue of the permission implied in sect. 30 of the Act 25 & 26 Vict. c. 89, to recognise trustees in their trust capacity, and to insert their names in the said register of shareholders expressly as trustees. Trustees were by the company's contract debarred from attending meetings of the company.

The company of the *City of Glasgow Bank*, by their assent given to the said transfer in manner foresaid, and by the entry in the stock ledger or register of

shareholders, entered into a special contract with the principal Petitioners to admit them as holders of stock in their representative capacity as trust disponees, under the deed of Mrs. *Syme* and Mrs. *Boyd*, or administrators of the trust estate thereby conveyed, and by the terms of their obligation the Petitioners undertook only to subscribe to the undertaking, and to be liable in the obligation incumbent on holders of stock, to the extent of the trust funds under their administration. They are, therefore, only liable to be placed on the list of contributories in part second thereof, as contributories in a representative capacity.

The Respondents answered:—The liquidators had no knowledge of the amount of the value of the trust estate, and deny that it is the measure of the Petitioners' liability. Denied that the Petitioners only became liable "in their representative capacity as administrators of the trust estate," or that the directors of the bank entered into a special contract with them whereby their liability was in any way limited. Neither the bank nor its directors had any power or authority to enter into any such contract, and they never did so.

The dividends that became due upon the £6000 stock were paid to the Petitioners or their agent, with their authority. The Petitioners are partners of the bank, and are contributories liable in their own right.

A minute of admission was arranged by the parties, which contained the above facts.

The Court of Session on the 20th of December, 1878, unanimously held that the decision of the House of Lords in *Lumsden* v. *Buchanan* (1) governed this case; and that therefore the Appellants were personally liable to pay all calls made in respect of the shares they held (2).

From this decision the trustees appealed.

March 20, 21, 24, 25.

Mr. *Napier Higgins*, Q.C., and Mr. *John M'Laren* (of the Scotch Bar) for the Appellants, contended that they had never agreed to become, individually and personally, members of this company; the contract they had with the bank was to hold themselves liable only to the extent of making the trust estate forthcoming, and accordingly they were accepted, and registered by the company as holders of stock merely "as trust disponees."

The contract with the bank was of a qualifying character, governed by the peculiar law of *Scotland*, under which obligations undertaken by trustees in their representative capacity did not imply individual responsibility.

The Respondents contended that such a contract was *ultrà*

(1) 4 Macq. 950; Court Sess. Cas. 3rd Series, vol. ii. p. 695; and vol. iii. (H. L.) p. 89.

(2) Court Sess. Cas. 4th Series, vol. vi. p. 392; Scot. Law Rep. vol. xvi. p. 147.

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vires of the bank's contract of copartnership. Then, if that was the case, the Appellants, never having become members of the company, the transfer was ineffectual, and the whole transaction was a nullity, having no force or effect, leaving the trust estate of the transferors solely liable, their names still remaining on the register.

Regarding the facts of both cases, neither the decision in *Lumsden* v. *Buchanan* (1), nor the principle there involved, governed this case. In that case eight of the Court of Session Judges against four held that *Buchanan* and others, who were on the register of the *Western Bank* as trustees, were not personally liable for calls; on appeal this decision was reversed by Lord *Westbury*, L.C., Lord *Cranworth*, and Lord *Kingsdown*.

There was a wide distinction between the law of *Scotland* and that of *England* governing the position, functions, and office of trustees; and on the construction of contracts made by trustees, see opinions of Lord *Barcaple* (2), Lord *Curriehill* (3), and Lord *Bentholme* (4), in *Lumsden* v. *Buchanan*. These opinions of the law were not displaced in any way by the reversal of that case by the House of Lords. Lord *Deas*, in the present case, also gave a very strong opinion on this point (5). See also the opinions of Lord *Westbury* (6), Lord *Kingsdown* (7), and Lord *Moncreiff* (the Lord Ordinary), in *Gordon* v. *Campbell* (8).

The Legislature had refused to extend to *Scotland* what it enacted in *England* and *Ireland*—that there should be no notice of trusts on the list of partners of banking companies. The *Joint Stock Companies Act*, 1856 (19 & 20 Vict. c. 47), contained, in the 19th section, the provision that "no notice of any trust, express or implied or constructive, shall be entered on the register or receivable by the company." This Act, though it applied to *Scotland*, did not include banking companies (sect. 2), but by 20 & 21 Vict. c. 49, s. 3, it was extended to banking companies; but sect. 15 specially provided that sect. 19 of the Act of 1856 should

(1) 4 Macq. 950.
(2) Court Sess. Cas. 3rd Series, vol. ii. p. 723.
(3) Ibid. p. 736.
(4) Ibid. p. 718.
(5) Court Sess. Cas. 4th Series, vol. vi. p. 405; Scottish Law Rep. vol. xvi. p. 150.
(6) 4 Macq. 955.
(7) Ibid. 968.
(8) Court Sess. Cas. 2nd Series, vol. ii. p. 643, the Lord Ordinary's Note.

not apply to any banking company in *Scotland*. Then followed the *Companies Act* of 1862, under which the *City of Glasgow Bank* was incorporated. Sect. 30 also excluded the application of the rule to *Scotland*, therefore trustees have always been receivable in their fiduciary character. The Appellants' case was that, by the law of *Scotland*, a body of trustees is recognised as representing a proprietary interest distinct from that of the individuals comprising it, that trustees as a body can enter into contracts in that capacity without pledging their individual credit and responsibility, and that, where the contract is entered into with the trustees in their representative capacity, the law will not support the other contracting party in a claim in which the special character or qualification of the contract is ignored, and the trustees are treated as individually responsible to him: *Bell's* Com. (1). It was the inveterate practice in *Scotland*, wherever trustees had occasion to enter into contracts for the benefit of the trust estate, to qualify the conveyance or obligation with the words "as trustee," or words of equivalent import, which were understood in Scotch practice to qualify the obligation, so that the estate which the trustees represented should be only liable. And where trustees sold any portion of trust property they were bound to grant warrandice of the right they conveyed: *Forbes's Trustees* v. *M'Intosh* (2); Prof. *Menzie's* Lectures.

Again, as to the difference of the law; in *Scotland* a gratuitous trustee had a statutory right to resign his trusteeship: 24 & 25 Vict. c. 84, s. 1, and 30 & 31 Vict. c. 97, s. 10; they also had the rights of a quorum. But in *England*, he could not withdraw, except by the consent of all the beneficiaries, or by virtue of some provision in the deed, or by an order from some competent Court; also every trustee in the absence of some special provision was bound to agree in every act of the other trustees.

[EARL CAIRNS:—In certain cases, such as *Gordon* v. *Campbell* (3), the contract might be "we as trustees agree to do so and so," well, the meaning of that was not a question of Scotch or English law, but simply a question of construction. Do you produce any authority as to any peculiarity of the law of *Scotland* on

(1) Vol. i. pp. 30, 31, 38, 39. (2) June 15, 1822; 1 S. 497; 2nd Ed. p. 462.
(3) Court Sess. Cas 2nd Series, vol. ii. p. 643.

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this point except such instances as *Gordon* v. *Campbell?* which was, as it appears to me, an instance only of the construction of particular words.]

None of the authorities are so clear as *Gordon* v. *Campbell* (1), but the law as to trustees undertaking as trustees was so well understood in *Scotland*, that no authority was needed. For generations the people of *Scotland* had entered into the situation of trustees and had thus contracted, believing that they were not personally liable. A great and immense difference in *Lumsden* v. *Buchanan* (2) was, that there the trustees were original allottees, and appear to have been bound to take the stock before they executed the deed at all; they executed the deed as individual partners might; appending afterwards in the testing clause for collateral purposes that they were trustees; but here the Appellants executed the transfer, in the most explicit way, "as trust disponees," over and over again in the body of the deed and in terms corresponding to *Gordon* v. *Campbell*. There was no real difference between the words "*qua* trustees only," and "as trust disponees;" in fact the decision in *Gordon* v. *Campbell* governed this.

[EARL CAIRNS:—You say that the trustees stipulated to make themselves liable only to the extent say of £5000, the amount of the stock, the amount of the trust estate, could such a thing have been done, this being a bank of issue with unlimited liability?]

Yes, by the law of *Scotland*, and the bank could accept them, the real intention of the transfer was nothing more than this, that the trustees should be put on the books in respect of stock as to which the company and the public had already members, Mrs. *Syme*, and Mrs. *Boyd*, who were perfectly competent to deal with the stock.

In *Scotland* trustees were a quasi corporation, who contracting as trustees, bound themselves only to the extent of corporate property in the trust estate; see opinions of Lord *Cranworth* in *Lumsden* v. *Buchanan* (3), and Lord *Campbell*, in *Gordon* v. *Campbell* (4). See also Second Report of Mercantile Law Commission,

(1) Court Sess. Cas. 2nd Series, vol. ii. p. 643.
(2) 4 Macq. 950.
(3) 4 Macq. at p. 961.
(4) 1 Bell's Ap. at p. 458.

1855. And the statutory right of resignation and of voting by a quorum could not be disregarded. The transfer framed at the office of the company was intended to hold out this assurance, "We (the directors) will accept you as trust disponees, as persons competent to bind a large estate, which we know is worth more than £70,000, and we hold you only liable to that extent."

The importance of the word "as" was shewn by the decision in *Gadd* v. *Houghton* (1); there the words "on account of" were held to bind the foreign principal, and not the broker who executed the contract. The real effect of the transfer as between the transferors and transferees was altogether independent of the articles of copartnery; it was not a transfer of stock, but of trust. In the deed of partnership of the *Western Bank* (*Lumsden* v. *Buchanan*) the words "heirs, executors, and successors," implying personal liability, were used, whereas here only "heirs and successors" (2); and the words "successors and assigns" used in the transfer had special importance in the law of *Scotland*, owing to there being a right of resignation of the trusteeship under the statutes.

In the *Companies Act* of 1862, clauses 76, 77, 99, 101, and 105, provided for representative liability; but there was a general recognition in the Act that there might be other cases than those enumerated; and *Scotland* was an exceptional case; in fact, if their contention and Lord *Deas'* opinion was correct, there was a representative liability there which would not be in *England*. The Appellants were merely representatives of others within the 99th section. They had not agreed in accordance with the 23rd section of the Act of 1862 to become members, but were in the same position as persons who had applied for shares on conditions, not accepting them unconditionally.

They submitted that the contract was not *ultrà vires;* but if the directors had no power to accept the Appellants with the conditions, and in the capacity they offered themselves, then the transaction must be rescinded, the parties not being at one on the same radical point. The Court could not fix upon a person alleged to be a contributory any engagement larger or other than that into which he had entered: *Waterhouse* v. *Jamieson* (3). That

(1) 1 Ex. D. 357, 359. (2) See opinion of Lord *O'Hagan*, *post*, p. 379.
(3) Law Rep. 2 H. L., Sc. 29.

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case also decided that the rights of creditors of a company when enforced by liquidators, must be enforced by them in right of the company, and they cannot recover that which the company itself could not; and therefore if there was a valid contract with the company it was as binding on creditors as it was on the company, and must be effectually carried out; and *Oakes* v. *Turquand* (1) was not inconsistent.

The transfer, which was the bond between the trustees and the company, shewed that the intention of the Appellants was to come into the company as trustee of one of its partners; even as in a private partnership a trust might be constituted of the shares of a partner without personal liability: *Bullen* v. *Sharp* (2). The decision in *Stace and Worth's Case* (3) applied here, and amounted to this, that although a man might accept shares and come upon the register, and act as a director, doing acts becoming to the company, yet if it turned out his doing so was founded upon a contract which was an improper one and *ultrà vires* of the company, the whole matter might be rescinded: see also *Carling's Case* (4), in making persons contributories the real contract must be looked to.

The articles of copartnership plainly shewed that trustees and representatives of others were to be treated in a special way, distinct from partners, being debarred from attending meetings and becoming directors (clauses 13 and 14). The directors had full power to reject the Appellants in their capacity of trustees, as they had also gratuitous transferees of shares: clauses 34 and 37. *Lumsden* v. *Peddie* (5) was the case of a *curator bonis* who accepted the transfer as such for his ward; but that case not coming on appeal to the House of Lords was no authority here. Therefore the Appellants ought not to be held to incur this overwhelming liability in respect of a contract for which they reaped no benefit whatever; and which if fairly construed in view of Scotch law could never have been held to apply to persons in their position. Either the list of contributories ought to be rectified, or else the registration held as a nullity; the effect being to leave the transferors on the register as shareholders.

(1) Law Rep. 2 H. L. 325.
(2) Law Rep. 1 C. P. 86, 102.
(3) Law Rep. 4 Ch. 682.
(4) 1 Ch. D. 115.
(5) Court of Sess. Cas. 3rd Series, vol. v. p. 34.

Mr. *E. E. Kay*, Q.C., Mr. *Benjamin*, Q.C., Mr. *Davey*, Q.C., and Mr. *Kinnear* (of the Scotch Bar), for the Respondents, contended that the obligations of parties must be decided by looking at the contract of copartnership. The contract here imposed on all its members personal or individual liability for its debts and obligations; there was only one class of shares, namely, those of unlimited liability. The Appellants did not deny that they became transferees of Mr. *Murdock's* stock which were shares of that kind, and therefore by clause 33 they took the place of their predecessors, and came under the same obligations. The directors had no power to make any special contract with the trustees limiting their liability, and none was made, but if there had been, it would have been *ultrà vires* of the directors, and simply void, the Appellants remaining partners and personally liable. Clauses 13 and 14 of the articles of copartnery referred to persons, who were not partners, but trustees, factors, or other guardians of partners who were incapacitated, such as bankrupts, infants, or persons *non compos*. These clauses read with clause 6 meant that a person might be the representative of an actual partner, and need not put himself on the register as such; the shares would then belong to the estate which he represented, but if a person became a partner himself, though only a representative one, he must be subject to all the liability of an original partner.

The bank was not a party to the deed of transfer at all; for all that was required to make the transferee a complete partner was a disposition by deed of the shares to him, and that that disposition should be intimated to the bank for registration. The mere production of the transfer to the bank *ipso facto* inferred the acceptance of the stock, clause 38, and all else in the deed beyond the disposition was surplusage. Registration under the *Companies Act* of 1862 had no greater effect than to regulate how the rights of creditors were to be enforced in liquidation, namely, through the official liquidators, and not by direct recourse to the shareholders: see also sects. 179 to 196.

As to the law in *England*, Lord *Cranworth*, in *Greenwood's Case*, gave a very lucid statement of the law regarding joint stock companies (1). In *Farhall* v. *Farhall* (2) an executrix opened a

(1) 3 De G. M. & G. 476. (2) Law Rep. 7 Ch. Ap. 123.

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banking account for the trust estate, but the bank was not allowed to prove against the trust estate for a balance due. The case of trading by executor was stronger. On the other hand, as to the law in *Scotland*, the Lord Justice Clerk, in *Lumsden* v. *Buchanan* (1), said that it seemed repugnant to the whole principle of joint stock law that any one should become a partner, and yet limit his liability by adding a modifying term to his signature (2). The general rule was that the liability of trustees depended on the whole nature of the contract in each case: such words as "we contract as trustees" did not in every case limit liability; it must be a question of construction: Lord *Cranworth* (3). So *Gordon* v. *Campbell* (4), which was a case of a heritable bond granted by the trustees, "*quâ* trustees only," over a trust estate in security of a loan, amounted to this, that in that particular contract the conclusion which the parties contracting intended was that the trust estate should only be liable. But a different question arose where trustees enter into a trading partnership, as here, which not only from its very nature, but also by the express terms of its constitution, imposed personal liability on all its members.

Bills or notes were obligations which, from their nature, imposed personal liability, although the trustees designated themselves "we trustees promise to pay:" *Thomson* v. *M'Lachlan's Trustees* (5); see also *Eaton* v. *Macgregor's Executors* (6). But even in contracts where the rights of third parties were not concerned, trustees had been held individually liable: *Higgins* v. *Livingstone*, road trustees (7); *Jeffrey* v. *Brown*, obligation for furnishings to a ship (8); *Thomas* v. *Walker's Trustees*, obligation to repair a house (9); *Nisbet & Co.'s Trustees*, obligation to payment of lease (10); also *Fairlie* v. *Neilson* (11); *Marquis of Abercorn* v. *Grieve*, obligation as to feu contract (12); see also *M'Laren* on Wills and Succession (13).

(1) 4 Macq. 950; Court Sess. Cas. 3rd Series, vol. ii. p. 695.
(2) Ibid. at pp. 711, 712.
(3) 4 Macq. 960, 961.
(4) Court of Sess. Cases, 2nd Series, vol. ii. p. 639; 1 Bell's App. 428.
(5) 24 June, 1829; 7 S. 787.
(6) 25 May, 1837; 15 S. 1012.
(7) 1816; 4 Dow. 341, 355; also 4 Paton's App. 401.
(8) 7 S. 102; 2 Shaw's App. 349.
(9) 4 Dec. 1832; 11 S. 162.
(10) 10 Dec. 1802; Morr. 15,268.
(11) 18 Dec. 1821; 1 S. 211.
(12) 16 Dec. 1835; 14 S. 168.
(13) Vol. ii. p. 500–513.

The real meaning for the insertion of the words "trust disponees," was that it was always the custom for the trustees to give the fullest notice to the bank, so that it might appear in the records that they were such trustees; there never being a moment in the history of Scotch banking where notice of trustees could not be entered on the register. Lord *Westbury* said such notices of trusts was not to alter or control the personal contract, and obligation which the trustees had entered into, but to mark the property in the shares as belonging to the trust estate (1). *Lumsden* v. *Buchanan* (2) was almost identical in every way with this case; and especially in the similarity between the articles of copartnery there and those here. The word "as" certainly did not appear there, but it did in the case of *Lumsden* v. *Peddie* (3), where the *curator bonis* of a lunatic was held personally liable. The trustees in *Lumsden* v. *Buchanan* were original allottees, but that was rather against the Appellant's contention that there was a special contract in their case. Trustees were not a corporation, and to say they were a quasi-corporation did not help the Appellants. Lord *Cranworth* saying "the trust had *thus* something of a corporate character incident to it" (4), did not amount to saying it was a corporation. On the death of the last trustee the trust did not come to an end—all the obligations incident to the estate or the last trustee passed to his representative.

This was a completed transaction, and the company were not bound to recognise any stipulations. Even persons who became shareholders on special conditions will be contributories, although the conditions have not been complied with: *Lindley* on Partnership (5). *Bridger's Case* (6) is most like this, if there was any condition at all here: see also *Waterhouse* v. *Jamieson* (7); *Oakes* v. *Turquand* (8); *Sir Edwin Pearson's Case* (9); *Daniell's Case* (10); *Nickoll's Case* (11); *Robinson's Executors* (12); *Davidson's Case* (13).

(1) *Lumsden* v. *Buchanan*, 4 Macq. 955.
(2) Court Sess. Cas. 3rd Series, vol. ii. p. 695; and vol. iii. (H. L.) p. 89.
(3) Court Sess. Cas. 3rd Series, vol. v. p. 34.
(4) 4 Macq. at p. 960.
(5) 4th Ed. p. 1347.
(6) Law Rep. 9 Eq. 74.
(7) Law Rep. 2 H. L., Sc. 34.
(8) Law Rep. 2 H. L. 325.
(9) 4 Ch. D. 222; on app. 5 Ch. D. 336.
(10) 1 De G. & J. 372; 23 Beav. 568.
(11) 24 Beav. 639.
(12) 2 De G. M. & G. 517.
(13) 3 De G. & Sm. 21.

3 Jur. N.S. 863.

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Mr. *Napier Higgins*, Q.C., in reply:—

The Appellant's contention was not that there were two kinds of shares, but that there were several classes of shareholders, viz., ordinary shareholders; those of which the status as shareholders was in abeyance; and a class of persons who held shares for the bank—these last certainly could not be put on the list of contributories. This being the case, and, looking to the power of the directors, and the interest of the company, and that there was nothing express or implied in the terms of the articles of copartnery forbidding it, there was not much difficulty in coming to the conclusion that the company were fully warranted in entering into a qualified contract. Allotment of shares might also be made to a limited company who would only be liable in its corporate capacity. Neither the passage read from *Lindley* on Partnership, 4th Ed. p. 1347, nor any of the cases there cited, had a material bearing on this question. In almost all those cases there was a clear compact to take shares, with or without some collateral agreement, some being decided on the ground of fraud. The rule applied in *Carling's Case* (1) helped the Appellant's contention that if the company did not take the shareholders on the same terms as they offered, there then was no contract at all. It was not correct that a mere disposition of the shares would make a man a partner; by clause 38 there was to be a special deed of transfer, it being the duty of the directors to see that such deed was properly prepared, and in proper form, and to a proper person. *Thomson* v. *M'Lachlan's Trustees* (2), a case of a promissory note, and the other cases cited by the Respondents, did not apply. The terms of the transfer here were distinct and different from the terms of any document in *Lumsden* v. *Buchanan*. On the other hand, *Gordon* v. *Campbell* was an explicit authority in the Appellant's favour. If this appeal was not successful the consequence would be disastrous not only to the Appellants, but to the whole Scottish community; who, in the future, would be trustee? no one. The majority of the Judges in the Court below would have come to a different conclusion, were it not that they thought that they were bound by the decision of

(1) 1 Ch. D. 115.

(2) 24 June, 1829; 7 S. 787.

the House of Lords in *Lumsden* v. *Buchanan*, therefore if this appeal was allowed it would relieve the Appellants from a ruinous and overwhelming liability, and would be more intelligible to ordinary minds, less repugnant to common sense, and more acceptable to the minds of the community.

The Law Peers having taken time to consider their judgment, delivered the following opinions.

April 7. EARL CAIRNS, L.C. (having stated the facts as above, p. 338) :—

My Lords, whether, in any particular case, the contract of an executor or trustee is one which binds himself personally, or is to be satisfied only out of the estate of which he is the representative, is, as it seems to me, a question of construction, to be decided with reference to all the circumstances of the case; the nature of the contract; the subject-matter on which it is to operate, and the capacity and duty of the parties to make the contract in the one form or in the other. I know of no reason why an executor, either under English or Scotch law, entering into a contract for payment of money with a person who is free to make the contract in any form he pleases, should not stipulate by apt words that he will make the payment, not personally, but out of the assets of the testator. If, for example, *A. B.*, the executor of *X.*, contracted to make a payment as executor of *X.*, and as executor only, to *C. D.*, it would be difficult to suppose that any obligation except an obligation to pay out of assets was intended. *C. D.* in the case supposed would have authority to accept a contract so limited, and the words used could have no meaning, and could be referred to no object other than that of limiting responsibility. I do not know that there is in this respect any difference in principle between English and Scotch law, although there may be a difference in the application of the principle. It may be (I will not say more) that, from the English system of judgments in actions at common law, and from the difficulty of obtaining a judgment *de bonis testatoris* founded upon an engagement made by the executor, the English Courts have leaned against a construction which would

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not result in a judgment *de bonis propriis:* whereas in *Scotland*, where law and equity were jointly administered, such a difficulty did not arise.

But the first question, whether in *Scotland* or in *England*, must be, What is the contract into which the parties have entered? and that must be accompanied by another question, What is the contract into which the parties were competent to enter? For if words have been used of any ambiguity, or the object of which may be open to any doubt, that construction must, according to the well-known rules of law, be given which will make the contract a legitimate and valid one, and not that construction by which the contract will be destroyed.

Now it is to be observed that the directors of the bank were a body with limited and clearly defined powers and acting in the execution of a delegated and limited authority. The Appellants must be taken, as must all persons who deal with the directors of a company, and especially those who deal with the directors for admission into the company, to have known the nature and extent of the authority of the directors, and the character of contract which they were empowered to enter into. With regard to the directors also, it is to be borne in mind that if they exceeded the powers committed to them by the deed of partnership, if they placed the stock and capital of the bank in the power of persons brought upon the register upon terms less favourable to the other shareholders than the deed authorized, the directors would incur a liability to their constituents for so doing, and it is not to be supposed that they intended to incur this liability.

With these observations I will now ask your Lordships to bear in mind the general scope and provisions of the deed of partnership.

There is no limit of liability whatever for the shareholders of the company. The deed takes notice that the shareholders might be individuals or companies and bodies corporate; but the scheme of the deed is that the shares shall be held by individuals or by companies (that is to say, partnerships consisting of individuals), or by corporations, without any limit of liability in the individual

so far as he has property, or in the corporation so far as it has property. And, I need hardly observe, that there was no power by law to affix any limit of liability upon the shares, except by a resort to statutable arrangements, which in this case were not resorted to.

By the 4th section of the deed the parties bound themselves to contribute and pay when required the sums of money corresponding to the number of shares of the stock subscribed. By the 5th section the partners are to have the right to the profits, and to be liable for the losses, and bound to relieve each other of all the debts and engagements of the company in the proportion of their respective interests or shares in the capital stock. By the 6th section any person holding a share, whether as an assumed subscriber, or as a purchaser, heir, or other representative of a subscriber, shall be entitled to all the rights and subject to all the liabilities of an original partner of the company. The 13th and 14th sections contain careful provisions for the purpose of preventing any person interested in a share, other than the partner in whose name the share stands on the register, from attending or voting or interfering with the concerns of the company. The 33rd and 34th sections relate to transfers. The shares are to be transferable by the partners, and shall transmit and descend as personal property to their executors or representatives by testament. Every partner who shall dispose of his share of the company's stock agreeably to the regulations therein written, or who shall cease to have an interest in the concern through forfeiture or otherwise in the terms of the deed, shall be entitled to relief of the whole debts owing by the company, and the party or parties acquiring the shares so disposed of, or otherwise coming in right of the party or parties so ceasing to have interest, shall take and assume the place and liability of his author, ancestor, or other cedent. A gratuitous assignment by a deed *inter vivos* of any shares is to be effectual if sanctioned by the directors. If they withhold their sanction the share is to be sold by the directors and the price accounted for to the assignee. Shares may be disposed of onerously, but the name of the purchaser and the price must first be intimated to the directors, who are to have the option of purchasing for the bank. By the 37th section it is provided

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that where the shares of any partner are transferred, conveyed, or sold in terms of the article, the deed of transference shall be prepared at the head office; and the 38th section provides that this deed of transference, and also every assignment of shares in security or *mortis causâ* and confirmations thereof by right of succession, shall be recorded in a book to be kept for that purpose and the production of such writings to the manager or directors for registration shall, *ipso facto*, infer the acceptance of the capital stock therein specified and the liabilities of the parties having a right to the same as partners of the company; but no purchaser or other assignee of or successor to shares so acquired shall be recognised as a partner until his title is recorded in the books of the company. The 40th section provides that the person or persons, companies or corporations whose names shall at any time stand in the stock ledger containing the list of partners of the company, whether as original or assumed partners, shall be deemed and taken to be the proprietors of the several shares standing in the ledger in their respective names, and shall be liable to the payment of every call for instalments of capital stock to be made therein, and to all actions, suits, obligations, forfeitures, and penalties, and entitled to the whole profits and liable for all the losses to which the original proprietors of shares in the company are subject, liable, and entitled to by the deed, and the names entered in the ledger and the amount of shares shall be the sole evidence receivable at any meeting of the partners as to the right of voting at the meeting.

I have now referred to the principal clauses of the deed, and it is upon the terms indicated in these clauses, and upon those terms alone, that the directors had any authority to admit an assignee of shares as a partner into the bank. The scheme of the deed is clear. The bank is to consist of partners, and these partners are to be either individuals or corporations. There is no limit of liability. If the partner is an individual he is absolutely liable, to the extent of his means as an individual, for the proportion of the debt of the bank attributable to his share. If the partner is a corporation the corporation is liable to the extent of all the property which it may possess.

It is necessary to contrast with this the contract which the

Appellants allege was entered into between them and the bank, by reason of the use in the transfer to them and in the stock ledger, of the words "as trust disponees of Mrs. *Syme* and Mrs. *Boyd*." The Appellants undertook, as they say, to be liable in the obligation incumbent on holders of stock to the extent only of the trust funds under their administration. In the view of the Appellants there were as to these shares to be no partners of the bank individually liable. The liability as to these shares was not to be the liability of the trustees, but the liability of certain funds under the administration of the trustees. As to what these funds might be nothing is said. The trust might consist of nothing more than the shares themselves, and thus the shares be their own security; or the trust funds might be such as that, in a due course of administration, they might all be parted with before any liability came to be enforced against them. The bank would be obliged to consider and scan every deed of trust in order to determine whether the trust funds could, under the trusts declared, be properly used in the purchase of bank stock, or in the payment of bank liabilities. But putting these considerations aside, and assuming that the trust funds were a definite, declared, and always available sum of money, what would this be but the creation of shares with a limited liability? And if this limit of liability could be created for some shares in the bank, why not for all the shares in the bank? If the argument of the Appellants is right, what would there be to prevent every share in the bank being held by trustees who would be furnished with as a trust fund the precise amount to be paid upon the share, and would have no further liability? But this is just what the law would not permit to be done with regard to a joint stock company of this kind, except by means of the constitution of a company with liability limited according to the statute; and such a company the *Glasgow Bank* never was.

My Lords, I have no hesitation in saying that in my opinion the directors had no power under their deed, and the Appellants must be taken to have known that they had no power, to enter into or accept a contract of this description; and the contract if attempted to be made would have been *ultra vires* and void. But for this very reason, it appears to me to be necessary that your

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Lordships should consider whether the words upon which the Appellants rely require a construction which would invalidate the contract in which they occur.

Now these words are "as trust disponees of Mrs. *Syme* and Mrs. *Boyd*." My Lords, I do not wish to say that, in a case in which such a contract would be within the competence of the contracting parties, and where these words could not be referred to any other object or purpose, they might not, on the construction of the whole instrument, be held to negative the idea of personal responsibility. But I have endeavoured to shew your Lordships that such a contract would not be within the competence of the parties in the present case, and there is no difficulty whatever in assigning to the words a meaning and a purpose clear, intelligible, and within the limits of the contracting power of the directors. One object of these words, and one purpose served by them, is noticed in the judgment of the Lord President and Lord *Shand*. The Lord President says (1) that the practice of using them and of entering them upon the register arose, "not for the purpose of altering the liability of the holders of such stock as compared with the other holders of stock in the same company, but only for the purpose of marking the stock as the property of the particular trust named in the transference and in the register." The Lord President further observes, that it was the Scotch practice of marking trust stock in this way which prevented the Legislature extending to *Scotland* the enactment that no joint stock company should take notice of any trusts on its register of shares; and I may add there is no doubt that a permission to notice trusts on a register of shares is *primâ facie* a permission introduced for the benefit of the beneficiaries and not of the trustees. Lord *Shand* observes that the law of *Scotland* as to proof of trust is very stringent "in requiring that in all cases the averment that property is held in trust shall be proved only by a writing subscribed by the alleged trustee, or by his oath on reference; and that no more effectual way of avoiding the dangers of this limited mode of proof can exist than by having the title to the trust property qualified by a declaration on its face that the property is held for

(1) Scotch Law Reporter, vol. xvi. p. 147; Court Sess. Cas. 4th Series, vol. vi. pp. 398, 410.

behoof of others." A second purpose served by the words is, that they make it clear that the shares are held upon a joint account with a right of survivorship, and that they do not belong to the persons named on the register as tenants in common. It is possible (I will not say more) that there may be a third purpose served by the words founded on the law of *Scotland*, which gives peculiar facility to a trustee for retiring from the trust, and which might justify in the case of a retiring trustee a simpler mode of removing his name from the register than in the case of another joint owner.

My Lords, I have not up to this point referred to any authorities bearing upon the question, and even in the absence of authority I should have been of opinion, for the reasons I have stated, that the Appellants were personally liable in respect of these shares. I should have been of opinion that it was incompetent for the directors of the bank to have made with them any contract but a contract of personal liability, and that the words relied upon by the Appellants as limiting liability were introduced for and served a different purpose.

But, my Lords, almost the whole of the observations which I have made will be found, as it seems to me, to be supported by two authorities, decisions of your Lordships' House, and which will be the only cases to which I shall feel it necessary to refer your Lordships.

The first of these is the case of *Gordon* v. *Campbell* (1). In that case certain trustees borrowed, for the purpose of their trust, from Colonel *Gordon*, of *Cluny*, £7000, and granted an heritable bond over the trust property to secure the loan; they also bound themselves, "as trustees aforesaid," to make payment of the loan; and in the clause of warrandice of the land they bound themselves "*qua* trustees only" to warrant at all hands and against all mortals.

Now this was exactly such a case as in the earlier part of my observations I supposed might arise. It was perfectly competent to Colonel *Gordon* and these trustees to make any contract they pleased. Colonel *Gordon* might have insisted that they should be personally liable to him, or he might have agreed that they should

(1) 1 Bell's App. 428.

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only be liable as trustees, *i.e.*, to the extent of their trust funds. They professed in one part of the instrument to contract "as trustees," and in another "as trustees only;" and it was obvious that they meant in both places to contract in the same way. Further, if these words "as trustees" and "as trustees only," were not introduced to limit liability, there was no other purpose in the deed which they could possibly serve. They were absolutely unmeaning if they did not mean that the trustees were not contracting as individuals. Under these circumstances, the Court of Session, and afterwards this House, held that there was no personal liability created against the trustees beyond their possession of the trust funds.

The other case was that upon which so much of the discussion before your Lordships in the present appeal took place, the case of *Lumsden* v. *Buchanan* (1). The principal Respondents in that case had signed a deed of accession for shares in the *Western Bank*. In the testing clause their names and designations were followed by the words "trustees for Mrs. *Ellen Brown*, the majority surviving being a quorum;" and in the register of shareholders their names and addresses were entered, with the addition of the words "trustees for Mrs. *Ellen Brown*." This House held that the trustees were personally liable. The observations of the Lord Chancellor and of Lord *Cranworth* have been so frequently referred to during the argument of the present appeal, that I will not here repeat them. They appear to me to apply conclusively to the present case, and the decision of your Lordships in *Lumsden* v. *Buchanan* appears to me to derive, if it were possible, additional strength from the circumstance that my late noble and learned friend Lord *Kingsdown* stated that it was with some hesitation and regret he felt obliged to concur in the judgment, and from the further circumstance that this House had before it a most full and learned examination of the subject from all the Scotch Judges, of whom at that time four had declared themselves in favour of the Appellants in *Lumsden* v. *Buchanan* and eight in favour of the Respondents.

My Lords, I ought to observe that in *Lumsden* v. *Buchanan* (1)

(1) Court Sess. Cas. 3rd Series, vol. ii., p. 695; and vol. iii. (H. L.) p. 89; 4 Macq. 950.

the words in the deed and in the register were "trustees for Mrs. *Ellen Brown*" not "as trustees." In a case, however, in the same bank, which occurred immediately afterwards, *Lumsden* v. *Peddie* (1), *Peddie* was *curator bonis* to Mrs. *Broomfield*, and he accepted stock in these words: "I the said *D. S. Peddie*, as *curator bonis* foresaid, do hereby agree to take and accept the said capital stock, and *as such* bind and oblige myself," &c. The Lord Ordinary, in that case, and afterwards the Court of Session, held that the case was governed by *Lumsden* v. *Buchanan*, and that the introduction of the word "as" made no difference. From this decision there was no appeal. The Lord Justice Clerk in giving judgment in that case observed "It is now well settled that in this or any the like company no one can become a partner with a limited liability, or with any other liabilities than such as are borne in common by all the partners."

My Lords, this decision must be taken along with that of *Lumsden* v. *Buchanan*, and shews what was then understood in *Scotland* to be established as the law in such cases.

On the whole, my Lords, I am of opinion that the decision of the Court of Session now under appeal is correct, and I must move your Lordships to dismiss the appeal. It is difficult to use words which will adequately express the sympathy I feel for all those who have been overwhelmed in the disaster of the *Glasgow Bank*; and that sympathy is peculiarly due to those who, without possibility of benefit to themselves, and probably without any trust estate behind sufficient to indemnify them, have become subject to loss or ruin by entering, for the advantage of others, into a partnership attended with risks of which they probably were forgetful or which they did not fully realize. The duty of your Lordships is, however, to declare the law, and of the law applicable to this case your Lordships can, I think, entertain no doubt.

I move, my Lords, that the appeal be dismissed; and if no other arrangement has been made between the parties it must, I conceive, be dismissed in the usual way, with costs.

(1) Court Sess. Cas. 3rd Series, vol. v. p. 34.

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LORD HATHERLEY:—

My Lords, it would be impossible to come to any other conclusion in the present case than that which has been already announced as the conclusion arrived at by my noble and learned friend on the woolsack. Most anxiously does one scrutinize every case, especially every case presenting an appearance in any degree whatever of novelty, in order to see that the edge of justice is administered duly and not with undesirable sharpness. But, my Lords, this case really did appear to be one in which the Appellants must have been painfully conscious from the first opening that they had to struggle against that which had been settled and determined by the highest Court of Judicature, and which in reality, therefore, was not open to revision by any Court whatsoever. In vain did I listen during the argument for that which I was most anxious to hear; whether or not there had been any failure of justice in the case of *Lumsden* v. *Buchanan* (1); there was no distinction which could be made in any way available pointed out between the cases. The last distinction which was referred to by the Lord Chancellor, namely, that of the introduction of parties "as trustees," seems to have existed in the subsequent case of *Lumsden* v. *Peddie* (2); and in that case the distinction was not found to be available, or not so available as for it to be thought possible that an appeal could be founded upon it. The distinction raised before us was that in the one case new shares were applied for, and that in the other case shares were accepted by way of transfer, being dealt with in the open market. I apprehend, my Lords, that there can be no distinction founded upon any such thin discrepancy as that. The real point of the whole case is, as it appears to me, summed up in one or two clauses of the contract of co-partnership. [His Lordship here read the 4th, 5th, and 6th clauses.]

My Lords, what are these great companies in fact? They are very large and extensive partnerships. Every partnership, as we all know as a matter of almost elementary jurisprudence, involves equality of liability, and equality of participation in the profit and

(1) Court Sess. Cas. 3rd Series, vol. ii. p. 695; and vol. iii. (H.L.) p. 89; 4 Macq. 950.

(2) Court. Sess. Cas. 3rd Series, vol. v. p. 34.

loss; or if not equality of participation, at all events, participation upon some proportion analogous to equality, upon which the whole basis of the transaction stands. It does not depend upon who are the holders of the shares; the shares themselves are the things which regulate on the one hand the responsibility of the person who is the owner of those shares, and on the other hand the advantage and profit which the person who is the owner of that share is to acquire. Whosoever at any given time, be it for profit or be it for loss, finds his name attached to the ownership of a given number of shares, that person has to deal with those shares as provided by these articles of partnership deed, namely, to contribute to the loss and to share in the profit in proportion to the number of shares that he holds. That at once differs the case from that of *Gordon* v. *Campbell* (1), because in that case it was held that by the terms of the bond any person who stipulated or acted as trustee could say that he stipulated or acted as trustee only; which is the just reading of that deed. But when a person says that, you must find whether the persons with whom he is dealing have power to deal with him on such terms. In the case of *Gordon* v. *Campbell* (1) all the parties were *sui juris*, and had power to deal as they thought fit; but here when you are dealing with a company, either in applying for new shares, or in buying shares in the share market and bringing them to be registered, which made you a shareholder in the company, upon what terms do you become a shareholder? You must become a shareholder upon the original terms, and upon no other terms. The directors have a good many powers of an extensive description—powers when shares are offered for sale to purchase on behalf of the company, and a variety of other powers not altogether usual in companies of this kind, but those powers which they have are the only powers they are entitled to exercise, and there is no power in the deed to allow them to treat a certain set of shares in the company as being held by a different tenure from all the other shares, to be held as far only as certain particular estates will hold out. So that, as has been observed already, you might, to take an extreme case, imagine almost every lot of shares to be held upon different tenures as between the different proprietors of those shares,

(1) 1 Bell's App. 428.

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whereas the true principle from beginning to end of the deed, and the principle which, as I apprehend, was determined in the case of *Lumsden* v. *Buchanan* (1), was this: that those who are partners under a deed of this description take their profits and bear their losses according exactly to the number of shares which they hold.

As regards the introduction of the names of the trustees "as trustees" on the share list, we, perhaps, in *England* are a little surprised at it, because we have now long been accustomed to the practice of companies which first began with the *Bank of England*, which has always refused to recognise trusts at all; and the same practice has been adopted by railway companies and the like, in which wisely, or unwisely, trusts are not recognised upon the face of the share list. We are surprised to find any recognition of this trust; but the use of it one can easily see. With all its advantages, the rule of the *Bank of England* is productive sometimes of great inconvenience. I have myself known cases of considerable inconvenience where a man has become, say, the surviving trustee of three trustees; perhaps he has in the bank £5000 or £6000 of his own, and £10,000 as a trustee; and some day, when he goes to the bank, he will be surprised to find that he has £15,000 of stock, because the bank will not recognise trusteeship at all; and he finds himself registered as the owner, not only of his own stock, but of the stock that he holds upon trust. That is not always the most convenient arrangement, and sometimes it leads to worse accidents than that, because, if the last survivor of three or four trustees happens to be a person of dishonest character, he is the sole proprietor and has the sole command of the stock, and the bank is entirely free from all responsibility in dealing with it. That appears to have been thought, as the learned Judges say, not a desirable position to place matters in, and therefore, for the sake of the *cestui que trust*, notice is taken upon the face of the bank books of the existence of the trust; and also a second advantage accrues to him, namely, that when changes take place in the trust, then there is a note in the bank books which tells you that a change has occurred, without the necessity of having a new deed

(1) Court Sess. Cas. 3rd Series, vol. ii. p. 695; and vol. iii. (H.L.) p. 89; 4 Macq. 950.

entered for the purpose of saying that such a change has been made, and parties are thereby liberated from some expense and from a good deal of inconvenience.

Many reasons may be assigned for it, but whatever reasons may be assigned, it is impossible to hold that the other shareholders, who have either entered into the original contract of partnership, or have become shareholders since in a bank like this which we have now before us, can repudiate responsibility as shareholders on the averment of anything professed to be done on their behalf by the directors contrary to the general stipulations of the deed. The directors can only do that which their power and authority entitles them to do; and in vain one has asked to have any passage pointed out in this deed which authorizes the directors, in dealing with different lots of shares, to manipulate them in such a way that one lot of shares may go into one trust, and another lot into another trust, and a third lot into no trust at all, and that those shares may, in the event of disaster to the company, be held upon a different footing from the other shares; so that, so far from partaking, according to the number of their shares, in the profit and loss, it would be found that there was, as regards a very large proportion of the individual shares of the company, a regulation set up contrary to the express stipulations of the deed.

I am only saying what I believe to have been the principle in the case of *Lumsden* v. *Buchanan* (1); and beyond the case of *Lumsden* v. *Buchanan* I have not the inclination, nor do I see in any way how your Lordships have the power, to go.

LORD PENZANCE:—

The question involved in this appeal, though one of the deepest interest to the parties concerned, does not depend for its solution upon any very numerous or intricate considerations.

It is not to be denied that the Appellants, on the face of the transfer deed into which they entered with the banking company and whereby they became shareholders in it, announced in express terms that they did so "as trust disponees" for other people.

The question is, whether the statement of this fact has in any

(1) Court Sess. Cas. 3rd Series, vol. ii, p. 695, and vol. iii. (H.L.) p. 89; 4 Macq. 950.

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degree exonerated them from the obligations which attached to the character and position of shareholders which it was the object of that deed to confer upon them.

Speaking generally, there might no doubt arise an inference (if not rebutted by other circumstances) that a person who derived no benefit himself, and who acted only for the benefit of others, in contracts or engagements of any kind into which he might enter, would not intend thereby to expose himself to personal liability if it could be avoided. A general consideration of this character has, I think, largely pervaded the reasoning upon which the exemption of the Appellants from personal liability has been based and enforced in argument.

But meanwhile it will not be doubted that a person who, in his capacity of trustee or executor, might choose to carry on a trade for the benefit of those beneficially interested in the estate, in the course of which trade debts to third persons arose, could not avoid liability on those debts by merely shewing that they arose out of matters in which he acted in the capacity of trustee or executor only, even though he should be able to shew, in addition, that the creditors of the concern knew all along the capacity in which he acted.

The case of an agent who acts for others is, of course, entirely different. His contracts are the contracts of his principal; and the liabilities from which, as a general rule, he is personally exempt, fall upon his principal who acted through him.

But to exonerate a trustee something more is necessary beyond the knowledge of those who deal with him that he is acting in that capacity, and it would not be sufficient in all cases to state that fact on the face of any contracts he may make. To exonerate him it would be necessary to shew that upon a proper interpretation of any contract he had made, viewed as a whole—in its language, its incidents, and its subject-matter—the intention of the parties to that contract was apparent that his personal liability should be excluded; and that although he was a contracting party to the obligation the creditors should look to the trust estate alone.

These propositions are, I conceive, conformable to the law of *Scotland*, equally with that of this country.

It is not enough, then, in the present case, to shew that the

Appellants on the face of the transfer deed accepted the "stock" in question "as trustee disponees;" but they must go on to shew that the proper construction of that instrument shewed the intention of the parties to be that, being trustees, they should not be personally liable.

It becomes, then, material to inquire what was the nature of the partnership whose "stock" they agreed to accept, and in whose business they agreed to become partners—and how far the nature of that "stock," and the constitution of that partnership, is consistent with the exemption which they now claim.

The constitution of this banking company was framed and declared by the partnership deed to which reference has been made. It provides for one class, and for one class only, of shares and shareholders, and declares in express terms that the partners shall have a right to the profits, and be liable to the losses, and bound to relieve each other of all debts and engagements of the company, in the proportion of their respective interests or shares in the capital stock thereof.

The exact provisions of the deed in this respect have been recalled to the attention of your Lordships by the Lord Chancellor, and it is needless to repeat them.

This deed the Appellants have not actually signed, but they have executed the deed of transfer, in which they have expressly declared their acceptance of the stock in question upon the footing that they should be "subject to all the articles and regulations of the said company, in the same manner as if they had subscribed the contract of co-partnership."

Having thus become shareholders in a partnership the members of which have by their deed of partnership agreed to stand upon an equal footing, one with the other entitled equally to the profits, and bound equally to the losses,—the question is raised whether, by stating in their deed of transfer that they so became shareholders as trust disponees for other persons, the Appellants have altered or limited the obligations that otherwise would attach to them. In my opinion they have not.

There are many contracts in respect of which if a man were to state, in contracting, that he only did so as trustee, it is quite conceivable that his contract might be construed as not being

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intended to bind himself personally The case of *Gordon* v. *Campbell* (1) offers an example of such a construction.

Other cases may be easily imagined in which on the one hand the intention to restrict the liability of the person contracting may be clearly inferred from the character in which he declared that he contracted, taken in connection with the other circumstances of the case, and in which, on the other hand, nothing is to be found inconsistent with that restriction in the subject-matter of the contract.

But in this case the subject-matter of the contract was the "stock" of an association whose shares were, by the very terms of its constitution, to be held only by persons who were all to be personally, and equally, liable to its obligations—and it cannot be held that the liabilities in respect of this "stock" were intended to be restricted by the words "as trust disponees" without ignoring the very nature and inseparable incidents of the thing which formed the subject-matter of the contract.

In a word, it comes to this:—Such a thing as a share in this association, with a limited liability in the holder of it, did not exist—no such share or "stock" had ever been created—no provision is made for it in the partnership deed, and every provision to be there found which speaks of the liability of those who hold the shares is diametrically and in the most express language opposed to it. If, then, the Appellants did not become bound to the liabilities attaching to ordinary shares, and ordinary shareholders, they did not become bound at all, and the contract of transfer would be void.

But before your Lordships can arrive at such a conclusion you must, I think, be at least satisfied that the words "as trust disponees," in this particular deed, so clearly imported an intention not to undertake the obligations of shareholders (though the entire contract might thereby be rendered contradictory and absurd) that they could have been introduced for no other purpose. For if a reasonable interpretation can be assigned to these words, which would permit the deed to stand as a consistent one competent to effect that transfer of stock which it was the obvious intention of the parties to bring about, your Lordships would be bound to accept that interpretation.

(1) 1 Bell's App. 428.

Such a reasonable interpretation was suggested in the case of *Lumsden* v. *Buchanan* (1), and is referred to by the Lord President in his judgment in the present case. His Lordship says: "Hence arose the practice referred to in *Lumsden* v. *Buchanan* of taking notice of trusts in the transference and registration of such stocks, not for the purpose of altering the liability of the holders of such stock as compared with the other holders of stock in the same company, but only for the purpose of marking the stock as the property of the particular trust named in the transference and in the register" (2).

The whole question then is, as it seems to me, one of construction as to the proper interpretation to be put upon this transfer deed and the acts of the Appellants under it, and for the solution of that question your Lordships have before you these two alternatives—on the one hand a construction which gives a reasonable and efficient meaning to the words "as trust disponees" and is not inconsistent with that transference and acceptance of "stock" which was the sole object of the instrument—and on the other hand a construction which defeats the intended transfer of stock altogether, and reduces the deed of transfer to a nullity. According to all known principles of construction, your Lordships are, I apprehend, bound to accept the construction which gives effect to the instrument.

A great deal was said in the course of the argument as to the difference between the law of *Scotland* and that of *England* regarding trustees. But the principles upon which written instruments are to be construed, and particularly the principle to which I have just alluded, that any construction which invalidates the instrument altogether ought to be rejected, if a reasonable construction can be found which gives effect to it, are surely common to the law of both countries. And in whatever light the law of *Scotland* may regard trustees, if it does not go the length of regarding them as corporate bodies (which it has been admitted it does not) they must, I think, remain liable upon contracts and engagements into which they have personally entered, and in

(1) Court Sess. Cas. 3rd Series, vol. ii. p. 695, and vol. iii. (H.L.) p. 89; 4 Macq. 950.

(2) Scottish Law Reporter, vol. xvi. p. 147; Court Sess. Cas. 4th Series, vol. vi. p. 400.

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which no exemption from that liability is to be found expressed or properly implied.

I have offered these remarks to the House upon the footing of the matter being "*res integra*," but in truth the present case is, in my opinion, governed in principle by the case of *Lumsden* v. *Buchanan* (1).

What the principle involved in that decision was, is, I think, rightly appreciated and declared by the learned Judges in the Court of Session.

The Lord President said the rule of liability then established might be stated in a single sentence, as follows: "Persons becoming partners of a joint stock company such as the *Western Bank*, and being registered as such, cannot escape from the full liabilities of partners, either in a question with creditors of the company, or in the way of relief to their co-partners, by reason of the fact that they hold their stock in trust for others, and are described as trustees in the register of partners, and the other books and papers of the company." And Lord *Deas* said that the grounds of decision in *Lumsden* v. *Buchanan* "resolved themselves into this, that where trustees join in a contract of partnership for trading purposes, such as a contract for carrying on the business of banking, the mere designation of them as being trustees will not exempt them from the same personal liability as is undertaken by the other partners, or limit their liability to the value of the trust estate."

It is matter for deep concern, not unmingled with surprise, that the legal effects attaching to these contracts of trustees having been thus asserted and exposed in a notable case as long ago as the year 1865, people should have been found still willing to enter into them.

But in all probability the profound conviction with respect to the great banks in *Scotland* that such a thing as loss or liability was not to be practically apprehended at all, may have led to a widespread indifference as to the legal consequences of this improbable event, should it ever come to pass.

Be this, however, as it may, your Lordships, while bound to

(1) Court Sess. Cas. 3rd Series, vol. ii. p. 695, and vol. iii. (H.L.) p. 89; 4 Macq. 950.

give effect to the lawful rights of the creditors, will not the less commiserate losses and sufferings which, in their amount and intensity, rise to the level of a national calamity.

LORD O'HAGAN:—

My Lords, I agree with my noble and learned friend on the woolsack, that it is impossible to approach the decision of this case without feelings of the deepest pain. That persons undertaking the onerous duties of trustees, from kindness to others, and without the smallest view to their personal advantage, should be involved in ruinous responsibilities which, in many cases, may not have been within their contemplation when they accepted the trusts, must be regarded as a calamity, appealing to our sympathy and compelling our regret. But we are bound simply to regard the legal rights and obligations of the parties before us; and I am constrained to the opinion that the unanimous judgment of the Court of Session must be affirmed.

My Lords, the question in this appeal appears to me to be concluded by authority, and I do not feel that it is necessary to discuss the grounds on which the decision in *Lumsden* v. *Buchanan* (1) was founded, as it would have been if the matter were *res integra*. Those reasons have been shewn, by my noble and learned friends who have preceded me, to have been very cogent; but I am content to rest on the decision of the House in a case which I think undistinguishable, in any material particular, from that before us. I shall only refer to the arguments by which it was justified, as applicable to both of them and as establishing identity between them.

The question is one of contract and construction, and the contract of the trustees in *Lumsden* v. *Buchanan* (1) was in substance, and, as I shall indicate immediately, almost precisely in terms, the same as that with which we deal in the present case. There, as here, it was rightly urged that the directors of a company founded on the principle of unlimited liability had no authority to admit shareholders on terms inconsistent with that principle. The competency of the directors of the *Western Bank* was held to be

(1) Court Sess. Cas. 3rd Series, vol. ii. p. 695, and vol. iii. (H.L.) p. 89; 4 Macq. 950.

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bounded by the provisions of their deed of co-partnership. They had obtained no statutable powers under the Limited Liability Acts. They had received no authority from the individual shareholders to alter or modify the conditions of membership of the company. There was no pretence for saying that the words of the deed, and the undertakings of the allottees or transferees, had relation to anything but liability without limit; and, therefore, it was expressly held, as a main foundation of the judgment in that case, that the directors, being incompetent to qualify the responsibility of the shareholders on the ground of trusteeship, or create a limited liability unauthorized by statute, should not be assumed to have attempted an act quite *ultra vires*, if the terms of the contract of the trustees were, in any reasonable way, capable of reconcilement with the proper discharge of their duty and the true effect of the co-partnery deed.

The custom to notice trusts on the register in *Scotland* was assumed in the Court of Session and in this House to have arisen for the purpose of facilitating the proof of the character of the property, and not as qualifying the liabilities of the shareholders, inasmuch as the Scotch law requires evidence of trusteeship, either by the oath of the trustee or by a writing under his hand, which cannot always be obtained; and this was taken as a sufficient account of the reason of the thing. The maxim, "*ut res magis valeat quam pereat*" was applied; and it is plain that this ground of decision is as applicable here as it was in *Lumsden* v. *Buchanan* (1).

Then, it was determined that the terms of the deed in the *Lumsden* case had no contemplation of more than one class of shareholders, and no regard to a distinction between fiduciary liability and personal liability. The reasons for hesitating to admit such a distinction with a view to commercial policy and results, have already been pointed out; but, in my view, it is enough to say that that case and this are identical in the want of a pretence for making the distinction. If, in *Lumsden* v. *Buchanan*, one class of shareholders only was admissible, with equal privileges and equal responsibilities, it is impossible to find

(1) Court Sess. Cas. 3rd Series, vol. ii. p. 695, and vol. iii. (H.L.) p. 89; 4 Macq. 950.

authority for admitting another in the contract of copartnership of the *City of Glasgow Bank*.

In the next place, the conditions of partnership in *Lumsden* v. *Buchanan* (1) were in no way more stringent or more absolute, for the purpose of creating the largest liability, than in the present case. The appellants accepted a transfer of the stock of Mrs. *Syme* and Mrs. *Boyd*, "with the whole interests, profits, and dividends that may arise and become due thereon, the said (Appellants) by acceptance hereof, being in terms of the contract of co-partnership of said bank subject to all the articles and regulations of the said company:" and declaring that they accepted of the transfer "on the terms and conditions above mentioned." The acceptance was made by them "as trust disponees;" but it bound them to "all the articles and regulations" of the company. I shall not again go over those "articles and regulations," to which my noble and learned friends have sufficiently referred in detail. But I would advert to the stock certificate, procured by the Appellants, referring to the entry of the names in the stock ledger, and describing them as "holders" of the stock; and then point to the 6th section of the contract of co-partnership, which is in these terms: "Any person holding a share of the said capital stock, whether as an assumed subscriber or as a purchaser, heir, or other representative of such subscriber, shall be entitled to all the rights and subject to all the liabilities of an original partner of the said company." I shall only further refer to the 40th section [which his Lordship read].

Now, looking to the contract of the Appellants as the transferees of the shares, and the "articles and regulations," by which they bound themselves to abide, nothing can be conceived more full and conclusive, more absolute and unconditional, than the acceptance on the one side, and the assumption of liability on the other. It is not pretended that, in this respect, the contract of co-partnership of the *Western Bank* differed materially from that which we have been considering. Indeed, it is hard to imagine any collocation of words more decisive for the purpose of negativing any distinction between classes of shareholders or any difference in their respective

(1) Court Sess. Cas. 3rd Series, vol. ii. p. 695, and vol. iii. (H.L.) p. 89; 4 Macq. 950.

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obligations—and, therefore, in the important matter of the specific terms of the contracts, *Lumsden* v. *Buchanan* (1) is wholly undistinguishable. Both those contracts were manifestly framed with a view to the maintenance of the recognised rule which establishes mutuality of right and responsibility *inter socios*, and divides the profits and the losses among all the members of a partnership according to their respective interests. In neither is there the least indication of a desire or design to depart from that rule, by creating an exceptional class with peculiar immunities.

The words of Lord *Kingsdown*, whose hesitation, I agree with the Lord Chancellor, as to the judgment in *Lumsden* v. *Buchanan*, gives to his ultimate concurrence with the other Law Lords peculiar force and significence, are important upon this point:—"When persons," he says, "have signed deeds of this description, it would be very dangerous to permit them to relieve themselves from the obligation of covenants into which they have expressly entered, on any speculation founded on mere probabilities that they did not really intend what the deed, in terms, expresses. Now, unless the covenants by which the parties subscribing the deed bind themselves, their respective heirs and successors, in the third clause of the first deed, and the second deed of succession, can be read, so as by some interpretation to exclude those who sign as trustees, it is not disputed that the covenant imposes personal liability, and there seems to be, in this, insuperable difficulty" (2). I shall have to observe, just now, on the argument as to the omission of the word "executors," in the *Glasgow* co-partnership contract; but I note, in passing, that the words "heirs and successors," on which Lord *Kingsdown* relies, as assisting to put "insuperable difficulty" in the way of limiting the liability of the trustees, are equally employed in that contract in the same connection and for the same purpose as in the contract of the *Western Bank*.

The general grounds, therefore, of the decision in *Lumsden* v. *Buchanan* seem to me to be completely applicable to this case;—the character of the contract: the incompetency of the directors to limit liability in defiance of its terms and disregard of the relations

(1) Court Sess. Cas. 3rd Series, vol. ii. p. 695, and vol. iii. (H.L.) p. 89; 4 Macq. 950.

(2) 4 Macq. at p. 970.

created by it: the legal impossibility of accepting fiduciary shareholders as a separate class, and the clear and unequivocal words of the covenant, stipulating for no exemption, as they forego no right.

If this be so as to the general grounds of decision, is there anything in the particular differences which have been suggested between the deeds to relieve us from the necessity of following the authority of *Lumsden* v. *Buchanan* (1).

It has been argued, that there is such a difference because, in this case, the Appellants are described as trustees in the body of the deed, and so registered, whilst in *Lumsden* v. *Buchanan* (1) the fiduciary character appeared only in the testing clause. But that clause was clearly embodied, by reference, in the deed, and was dealt with as being so embodied in the judgments of the noble and learned Lords. In this matter, therefore, for the purpose of decision, the difference is immaterial.

Then, it was said that the introduction of the word "as" in the transfer deed of the *Glasgow Bank* before "trust disponees," which is not found, in the testing clause in *Lumsden* v. *Buchanan* (1), demonstrates that the Appellants qualified their liability and entitled themselves to say that they are only answerable to the extent of the trust estate. There seemed some plausibility in the argument representing "trustees" as a mere word of description, and insisting that "*as* trust disponees" marked the character in which alone the transfer was accepted. And the case of *Gordon* v. *Campbell* (2) undoubtedly shews that, under certain circumstances, a trustee may, by apt words, limit his liability. The words in that case were held by this House to be sufficient for the purpose. But, there, the parties being free to enter into such a contract, their intention to do so was put beyond all question by the phrase '*quà* trustees only," and proper effect was given to it. That case, therefore, scarcely applies where the directors of a bank are incompetent to make a contract of the kind—where the nature of the dealing does not admit of it—and where, as in *Lumsden* v. *Buchanan*, a fair interpretation, in another sense, may be put upon the words, reconciling them, as I have said, with the duty of

(1) Court Sess. Cas. 3rd Series, vol. ii. p. 695, and vol. iii. (H.L.) p. 89; 4 Macq. 950.
(2) 1 Bell's App. 428.

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the directors and the rights of the shareholders. But the decisive answer seems to be, that the whole reasoning of the noble and learned Lords proceeded on the assumption that the trustees had dealt with the *Western Bank* only in that character, and that the *ratio decidendi* and the decision itself would have been exactly the same if, in the testing clause, the word "as" had been employed. This difference, also, appears to me insufficient to diminish the coercive force of the authority.

It was further argued, that another distinction arises because the Appellants were not original allottees of stock, and did not personally enter into an undertaking which might have bound them in that character. But I fail to appreciate the value of the point. The original allottees took the shares without limit of liability. The other shareholders and the creditors of the bank, therefore, acquired certain rights to be exercised in certain contingencies; and can those rights be destroyed merely because the Appellants are transferees, having accepted the transfer expressly "subject to all the articles and regulations of the company," in the same manner as if they had subscribed the contract? According to the doctrine of *Lumsden* v. *Buchanan* (1), in which the Appellants had signed a deed of accession, adopting the contract of the *Western Bank*, whilst here they accepted a transfer equally binding them to the terms of the contract of the *City of Glasgow Bank*, the directors had no power to treat trustees as a separate class with special responsibility; and had they made a transfer, it seems impossible to hold that those deriving under them could have been dealt with on a different principle. The directors were incompetent to deal with them on any other. There seems to be, therefore, no material distinction between the cases for the purpose of the argument, in the diverse mode by which the shares were acquired in each.

Then, it was strongly urged that the use of the words "heirs, executors, and successors" in the deed of the *Western Bank* implied personal liability in the trustees. And, unquestionably, Lord *Kingsdown* placed reliance on those words, although, as I have already said, he omitted from them, in his citation, the word

(1) Court Sess. Cas. 3rd Series, vol. ii. p. 695, and vol. iii. (H.L.) p. 89; 4 Macq. 950.

"executors," and thus reduced them to the expression "their heirs and successors," which occur and have equal force in the last clause of the contract of co-partnership of the *Glasgow Bank*, declaring that "the parties thereto, and their heirs and successors, shall be bound and obliged to observe and perform their respective parts of the present contract." So that, in the view of Lord *Kingsdown*, the terms of the deed before us would equally have imported personal responsibility with those which he thought important in the deed of the *Western Bank*. Besides, the absence of the word "executors" could have no differential effect, which is not removed by the presence of the word "heirs" and the interpretation given to it by the Scotch law, as connected equally with the devolution of personal and real estate, even if an undertaking to be bound might not be conclusively given without the use of the one word or the other. On this point, also, the argument has failed to satisfy me that any real distinction exists between the cases.

My Lords, I have adverted to the particular instances in which it has been sought to establish differences between *Lumsden* v. *Buchanan* (1) and the case of the Appellants, and, certainly, with no indisposition to recognise such differences if they could be shewn to exist, and after very grave and careful consideration, I find myself unable to discover a real distinction between them, and I think, with the Judges in the Court of Session, that the decision in the former case is absolutely binding in the latter.

We were pressed to regard the law and practice of *Scotland* as distinct from those of *England*, especially with reference to the position of trustees as clothed with something of a corporate character, by the former, which is admittedly unknown to the latter; and, undoubtedly, if a Scottish trust constituted a trustee or a number of trustees as a corporation, that would have relieved the individuals composing it from liability in their separate persons and imposed it on the body. But I have not discovered authority for such a position, whilst there seems to be very high authority the other way.

Arguments were also founded upon the registration and incor-

(1) Court Sess. Cas. 3rd Series, vol. ii. p. 695, and vol. iii. (H.L.) p. 89; 4 Macq. 950.

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poration of the *City of Glasgow Bank* under the Act of 1862, as distinguishing its position from that of the *Western Bank*. Those arguments appear to have been elaborately urged in the Courts below, but were not much relied on before your Lordships; and I think it enough to refer to the very able refutation which was applied to them in the judgments of the Lord President and Lord *Shand* in the Court of Session (1). The Joint Stock Acts of 1856 and 1862 operated certain changes; but there were no such changes with reference to the entry of notices of trust upon the registers of companies, or as to the character of the obligations undertaken by a shareholder, and properly ascertained or ascertainable from the contract of co-partnership.

I have adverted, I think, to all the material points which have been raised in the course of the able and elaborate arguments of the learned counsel for the Appellants; and on the whole, whilst I participate fully in the painful sympathy which has been expressed by my noble and learned friend on the woolsack, I am obliged to concur with his conclusion that there is no distinction between this case and *Lumsden* v. *Buchanan* (2), and therefore that the judgment of the Court of Session should be affirmed, and the appeal dismissed.

LORD SELBORNE:—

My Lords, by the 5th, 6th, 33rd, 38th, 40th, and last clauses of the co-partnership deed of the *City of Glasgow Bank* it is in effect provided, that every person who is at any time admitted as a partner shall be absolutely and without limit liable for all the debts and engagements of the company; and that all the partners shall be equally liable *inter se*, in proportion to their respective shares.

It is consistent with this that a plurality of persons may be (as is contemplated by the 13th and 14th clauses), co-proprietors of the same shares. The *aliquot* part of the common burden cast by the partnership contract upon those shares is exactly the same whether they are held by one or more than one person. If by

(1) Scottish Law Reporter, vol. xvi. pp. 147, 153; Court Sess. Cas. 4th Series, vol. vi. pp. 398, 410.

(2) Court Sess. Cas. 3rd Series, vol. ii. p. 695, and vol. iii. (H.L.) p. 89; 4 Macq. 950.

more than one, every one of the co-proprietors is bound to the company for the whole proportionate liability attaching to those shares, neither more nor less, and they, among themselves, are *primâ facie* bound to contribute equally to that liability. In this there is nothing extraordinary, nothing unjust. Whether they undertake the obligations of partners for their own benefit, or for the benefit of others, it is a question for themselves and not for the company.

By the 40th clause it is provided that those who stand registered as shareholders in the stock ledger of the company are, for all purposes of liability on the one hand and of participation in profits on the other, to be regarded as "the proprietors" of the shares. The effect of this provision, when considered in connection with the absence in this deed, and in the relative statute law, of anything to prevent the company from taking notice of trusts, is, that, although any partner who holds his shares in a fiduciary capacity will (of course) be bound to apply and account for any share of profits to which he may be entitled according to his trust, the company is entitled and is bound to look to him, and to him only, as having for all partnership purposes the sole title to the shares, both as to profit and as to liability, and he must be taken to have known and understood this when he accepted them.

Corporations (including, of course, incorporated companies, and therefore all companies formed with limited liability under the Act of 1862), might, under clause 40, be members of this co-partnership, and, being legal persons, they would be subject, in respect of any shares which they might hold, to precisely the same equal and unlimited liability with individual shareholders—every one of them being liable to the full extent of his whole means and estate. In the one case, the whole property of the individual, in the other the whole property of the corporation, would be answerable to the creditors, and (in contribution) to the co-partners of the bank.

If, by the law of *Scotland*, every trustee or body of trustees, acting in that character, were a corporation, and the trust estate corporate property, the Appellants in this case would be right. There would, on that hypothesis, be no need to shew that there was any special or exceptional contract between the Appellants

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and the co-partnership. The corporation would be liable and not the individual corporators. But no authority has been produced shewing this to be the law of *Scotland;* and it appears to me (postponing for the present all consideration of the effect of the decision in *Lumsden* v. *Buchanan* (1)), to be at variance with the case of *Martin* v. *Wight* (2). There Lord *Mackenzie* said, "A trust, with a power of assumption, does not establish a corporation; I do not think that a private trust is to be considered as of the nature of a corporation." And Lord *Fullerton*, "The case is different from a corporation, which is held to be one person;" "A trust for purposes does not create a separate constructive person like a corporation; the title of each trustee stands on the right made up in his own person." These observations related, indeed, to the mode of making up titles to heritable property held in trust when new trustees had been assumed, but the principle could not be limited to that case. If authority had been wanting, reason would lead to the same result. Corporations, properly so called, are public bodies created for definite purposes by Royal Charter or by public law; and this is equally true of quasi-corporations, or bodies having some, but not all, of the incidents of corporations. But, if the constitution of any private trust could in law have a similar effect, every individual would be able, for purposes and upon conditions of his own choice, without any restraint or regulation by public law, to invest himself or others with a corporate character, and so to limit and subdivide, by mere operation of law, what would otherwise be the effect of his and their engagements.

In *Lumsden* v. *Buchanan* (1) the Respondents were five persons, individually named and described in the testing clause of the deed, with this designation superadded to their personal names and descriptions: "Trustees for Mrs. *Helen Brown*, the majority surviving being a quorum." That designation, though occurring in the testing clause, was incorporated, by words of reference, into the inductive and operative parts of the deed. It could mean nothing less than that the title and interest of these five persons

(1) Court Sess. Cas. 3rd Series, vol. ii. p. 695, and vol. iii. (H.L.) p. 89; 4 Macq. 950.

(2) Court Sess. Cas. 2nd Series, vol. ii. p. 485.

to and in the shares for which they subscribed was fiduciary, and not beneficial; and that, in this sense, at all events, they subscribed "*as trustees.*" If, by the general law of *Scotland*, they were a corporation or quasi-corporation (it was admitted at the Bar that trustees cannot sue or be sued under any collective designation without using their own individual and personal names) I can imagine no ground on which it could possibly be held that they did not subscribe that deed in their corporate character. But the decision of this House was that they were all individually and personally liable.

To my mind, the present case depends upon this single point. But I think it right also to consider another and less technical way by which it has been sought to reach, practically, the same conclusion. The inequality which would be produced by allowing trustees to be accepted or assumed as partners upon the footing that the whole trust property, and that only, should be liable, is said to be apparent only, and not real; because the co-partnership and its creditors can never, in any case, get more from any partner than the whole of his property available for the payment of his debts, which property must in all cases have some limit, less or more according to circumstances, of which the other partners may know nothing, and must take their chance, and in some cases, may really be worth nothing at all; and it is contended, that, if they get the liability of the whole property subject to a particular trust, they get what is as good as, and may perhaps be better than, the liability of individuals. On these grounds, it has been contended, that it was open to the directors of the *City of Glasgow Bank* to accept the Appellants as partners on those special terms; and that they, in fact, did so.

The principle of this argument, when applied to such a co-partnership as the *City of Glasgow Bank*, seems to me altogether fallacious, however common a practice it may be in *Scotland* for simple money obligations, and other ordinary contracts, to be made between trustees and other persons competent to contract in any manner which they think fit, upon the footing that the trust estate only is to be held liable.

A contract of the kind supposed would really be for limited liability, though of an anomalous nature; the limit being unde-

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fined as to amount, variable in different cases, and subject in many conceivable cases to various doubts and questions. By the *Joint Stock Companies Act*, 1862, provision is made for limited liability in either of two ways, one of which is called liability limited by guarantee. This consists in an engagement by each shareholder to contribute towards the payment of the debts and engagements of the company, in case of its being wound up, a sum of money not exceeding a certain specified amount. The *City of Glasgow Bank* was not a company limited by guarantee or otherwise. If any individual shareholder had proposed to the directors to take an allotment of shares upon the condition that he should in no case be liable beyond a certain specified amount (in other words, that he should be a shareholder limited by guarantee), it is clear that the directors would have had no power under this deed to agree to such a condition, whether accompanied or not by a pledge in security of any particular fund or property. *A fortiori*, such a condition could not be annexed to a transfer of shares, originally issued and held by the transferor upon the ordinary terms of unlimited liability.

The effect of the Appellants' contention practically is, that on the occasion of the transfer to them of the shares registered in their names, something equivalent to this was done, though without specifying the amount of the trust funds constituting the assumed limit of their liability. It is stated that in the present case there were trust funds beyond the shares themselves, of large amount. But the principle of the argument, when taken in connection with the terms of this co-partnership deed, goes much further. If sound, it would enable a trustee-shareholder, when no other property was in trust, to become a partner without any personal liability at all, and also without any liability of any property or fund beyond the shares themselves. There is nothing in this deed to prevent any purchaser of shares in the market from causing them to be transferred into the name of a trustee declared to be such on the face of the transfer, who, according to this view, would be under no personal liability, and therefore would have no occasion for, or right to, any indemnity against the beneficiaries or against the author of the trust; and the purchaser himself, having never become a partner, would also be free from all liability.

Nor would such a transaction (at all events if it took place when the bank was a going concern and in good credit) be impeachable for fraud.

This co-partnership deed does not anywhere contemplate that shares once issued can undergo any alteration in their character or incidents by reason of any subsequent transfer. No authority is given to the directors to impose or accept any special terms, upon the accession of any transferee to the contract. They have power under clause 34, in the case of a gratuitous transfer, to require the shares to be sold in the market, and in the case of a transfer for value to purchase them at the price proposed to be given, if they think fit to do so. Unless they exercise this power, they cannot intercept the right of transfer, or object to receive any transferee, on the ground that he is a mere trustee, or for any other reason arising out of his relations to the transferor or any other person—relations into which, so far as I can see, he is not bound to recognise their right even to inquire. All that they can do is to regulate, under clause 37, the form of the transfer. The effect of the transfer, when made, is treated by the deed as the same in all cases. Under clause 6, the transferee (when registered) becomes "entitled to all the rights and subject to all the liabilities of an original partner of the company;" and under clause 38 he is to "take the precise place of his author."

What then, under these circumstances, is the effect of the introduction of the word "as" before "trust disponees" in the transfer deed, by which the Appellants in this case expressly agreed to become "in terms of the contract of co-partnership of the said bank, subject to all the articles and regulations of the said company, in the same manner as if they had subscribed the said contract?" This word "as" (twice used) constitutes the sole difference which can possibly be represented as substantial between the present case and *Lumsden* v. *Buchanan* (1); the omission of the word "executors" in the obligation undertaken at the end of this partnership deed by "the parties thereto and their heirs and successors" being certainly immaterial. It is urged that the necessary import of a contract in *Scotland* "as trustees"

(1) Court Sess. Cas. 3rd Series, vol. ii. p. 695, and vol. iii. (H.L.) p. 89; 4 Macq. 950.

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is to exclude unlimited personal liability; and that, if that could not be done, the transfer, and consequent registration, did not impose upon these trustees a liability to which they had never consented, but must wholly fall to the ground. Whether, if the premiss were correct, this conclusion would follow, it is unnecessary to inquire, because I think that the premiss is not correct. The authorities cited at the bar (*Gordon* v. *Campbell* (1) and *Thomson* v. *M'Lachlan's Trustees* (2)) shew that there is no fixed rule in *Scotland* as to the effect of such words, but that it must always depend upon the context and upon the nature and circumstances of the contract in which they occur. If they are open to either of two constructions, the one consistent with the context and with the substance of the contract, the other repugnant to and destructive of it, the former ought, certainly, to prevail. Applying that test, it appears to me that in this deed of transfer the words "as trust disponees" not only may mean, but do mean, the same thing which was meant by the designation of trustees (though without the word "as") in *Lumsden* v. *Buchanan* (3); and therefore that the Court of Session was right in holding the position of the present Appellants to be undistinguishable from that of the Respondents in *Lumsden* v. *Buchanan* (3), and to be governed by your Lordships' decision in that case.

It is hardly necessary for me to add that I concur, to the fullest extent, in the expression given by my noble and learned friend on the woolsack to the sympathy, which all your Lordships must feel, for the sufferers in this most painful case.

LORD BLACKBURN:—

My Lords, in an ordinary case I should have contented myself with expressing a general agreement with the reasons given by the noble and learned Lords who have already spoken, but the amount at stake and the hardship on the Appellants is so great that I think it right to give my own reasons.

The facts on which the question arises are few, and may be briefly stated. The contract of co-partnership of the *City of*

(1) 1 Bell's App. 428.
(2) 24 June, 1829; 7 S. 787.
(3) Court Sess. Cas. 3rd Series, vol. ii. p. 695, and vol. iii. (H.L.) p. 89; 4 Macq. 950.

Glasgow Bank was originally framed in 1839. The 6th article provides that "any person becoming the holder of a share shall have all the rights and be subject to all the liabilities of an original partner." The shares have since been converted into stock, and this article now applies to holders of stock. By the last article (No. 54), "The parties hereto and their heirs and successors shall be bound and obliged to observe and perform their respective parts of the present contract." It seems to me quite clear, and I think was not disputed, that those who took shares or stock and acceded without qualification to this contract became personally liable to fulfil the terms of it as much as the original subscribers. But the Appellants contend that they did not accede without qualification, and it is necessary to inquire how they acceded.

By a deed of transfer, dated the 27th of January, 1874, the then holders of £6000 stock transferred and made over to *William Muir* and three others named "the trust disponees," in a deed described, "their successors and assigns," £6000 stock in the *City of Glasgow Bank*, the said *William Muir* and others named "*as trust disponees* foresaid by acceptance hereof being in terms of the contract of co-partnership of the said bank subject to all the articles and regulations of the said company in the same manner as if they had subscribed the said contract. And we, the said *William Muir*, &c., *as trust disponees* foresaid, do hereby accept of the said transfer on the terms and conditions above mentioned;" and this is subscribed by the four persons in their own names. And there was an entry made in the stock ledger of the company, "*William Muir*" and the three others "*as trust disponees*."

I do not think that there is any other fact affecting the question before the House.

It appears, therefore, that these four gentlemen are in the same position as if they had with their own names subscribed the contract of co-partnership, but stated on the face of the instrument that they were trust disponees, and that the stock was conveyed to them, the trust disponees, and their successors and assigns; and that they as such trust disponees accepted the stock; and as if the bank, knowing all this, entered their names as trust disponees. And the question raised I take to be whether these statements do

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so qualify the contract into which they entered as to make them not bind themselves, their heirs and successors, personally, as would have been the case if they had subscribed the contract without any qualification.

Before the decision of this House in *Lumsden* v. *Buchanan* (1) in 1865, the question was one on which much difference of opinion prevailed; but nine years before the parties executed this transfer that decision of this House, so far as it extended, settled the law. I have carefully considered the judgments in that case, and I think this much at least must be considered as decided and settled, viz. that trustees (not created by a statute) are not by the law of *Scotland* a body corporate, or, as it has been loosely said, a *quasi* corporation. I have myself no doubt that if individuals enter into a contract because they are trustees, and for the benefit of the trust, it would be prudent in them to stipulate that, though they bind themselves to see that the trust funds are properly applied to fulfil that contract, their contract shall extend no further, and that they will not be personally liable to make good the deficiency, if any; and if they express such a limitation with sufficient clearness, and the other contracting party (being *sui juris*) accepts such a limited engagement, he cannot call on the trustees to do more than to fulfil that limited engagement. There was an opinion entertained by many Scotch lawyers, and to some extent countenanced by the decision in this House of *Gordon* v. *Campbell* (2), that by the law of *Scotland* a mere statement on the face of the contract that the contractors were trustees, and entered into the contract because they were trustees, was, as a matter of law, enough to express that the engagement was of this limited kind. I do not (speaking for myself) doubt that it is an important element to be taken into consideration in construing the contract, but I think the decision of *Lumsden* v. *Buchanan* (1) determines that it is not by itself enough to give any contract this limited effect, and certainly that it is not enough to do so when the contract is a contract of co-partnership, the nature of which would make such a limited engagement to say the least very inconvenient. If the matter were *res integra* I think I should have come to the

(1) Court Sess. Cas. 3rd Series, vol. ii. p. 695, and vol. iii. (H.L.) p. 89; 4 Macq. 950.

(2) 1 Bell's App. 428.

same conclusion, for the statement that the parties are trustees is not thereby made an idle or inoperative statement. It marks, as has been pointed out, that the property in the shares is trust property, which it is true is for the convenience of the trust only; but it also informs the bank that the property belongs to trustees, and will consequently in case of death vest by survivorship, and it is for the benefit of both parties that this should be known from the beginning. But even if it were an idle or inoperative statement, I do not think it a sound rule of construction that some effect must be found for every word, even if that can only be done by giving it a force beyond what it can reasonably bear. But I do not rest my judgment on this. I act on the ground that the decision in *Lumsden* v. *Buchanan* (1) is binding as far as it goes. And I see what I think good reasons for acting on it strictly in this and the other cases arising out of the stoppage of this bank. I think that the main object of the parties in the present case was that the shares should vest in the four gentlemen, and it is at the least very doubtful whether, if the contract was understood as the Appellants contend, that object would not be frustrated. Now, as a general rule of construction, ambiguous expressions in a contract should not be construed in a sense that would frustrate the main object of the contract; they should be construed *ut res magis valeat.* And if the trustees meant to limit their liability, it was for them to see that the words were sufficient to make that clear. Ambiguous words should be construed *fortius contra proferentem.* And for both reasons it seems to me to rest on any one, who after 1865 became or continued a shareholder, to shew that there is some substantial difference between the terms of his accession to the contract and the terms of that which in 1865 had been determined not to restrict the liability of the trustees. Now, as far as I can see, there is scarcely any difference in form, and none at all in substance, between the two. The contract of co-partnership of the *Western Bank* began by saying that the parties bound themselves, their heirs, executors, and successors. That of the *City of Glasgow Bank* ends by declaring that they bind themselves, their heirs and successors. Does the omission of the word "executors"

(1) Court Sess. Cas. 3rd Series, vol. ii. p. 695, and vol. iii. (H.L.) p. 89; 4 Macq. 950.

H. L. (Sc.) 1879 MUIR v. CITY OF GLASGOW BANK. Lord Blackburn.

make any difference? I cannot think that it does; and it is perhaps worth noticing that Lord *Kingsdown* quotes the words of the contract in the *Western Bank Case* (inaccurately it is true) as being that they bound themselves, their heirs and successors, shewing that he did not think the word "executors" was material.

The parties in *Lumsden* v. *Buchanan* (1) acceded to the contract by subscribing a contract (set out in the printed papers laid before the House in that case at p. 255). That deed of accession narrated that the directors had created new shares, and allocated them to a large number of persons designated in the testing clause. The designations were differently worded, I presume, according to the words in which the applications for shares were expressed. The designation of the Appellants in *Lumsden* v. *Buchanan* was "trustees for Mrs. *Ellen Brown*, the majority surviving being a quorum." That in the present case is "as trust disponees." Can that make any difference? I think not.

I therefore agree in the motion of the noble and learned Lord on the woolsack, that this appeal should be dismissed with costs.

LORD GORDON, although not present during the argument of the case, stated his full concurrence in the conclusion arrived at by their Lordships.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 7th April, 1879.

Agent for Appellants: *William Robertson.*
Agents for Respondents: *Martin & Leslie.*

(1) Court Sess. Cas. 3rd Series, vol. ii. p. 695, and vol. iii. (H.L). p. 89; 4 Macq. 950.

[PRIVY COUNCIL.]

NATIONAL BANK OF AUSTRALASIA (Defendant) . . . . . } APPELLANT;

AND

THE UNITED HAND-IN-HAND AND BAND OF HOPE COMPANY, REGISTERED (Plaintiff) AND LAKELAND (Defendant) . . . } RESPONDENTS.

J. C.*
1879
May 15, 16, 17;
June 14.

CONSOLIDATED APPEALS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Mortgagor and Mortgagee—Decree for Redemption where Bill impeached the Mortgage and did not pray to redeem—Liability of Mortgagee in Possession —Costs—Registration—Victoria Transfer of Land Statute, s. 83 *et seq.*

Although a mortgagor is not entitled to a decree for redemption on a bill which impeaches the mortgage securities and contains no prayer for redemption; yet such rule does not apply where the issues disclosed by the pleadings are not merely mortgage or no mortgage, but whether the Defendant by means of his acts subsequent to the impeached mortgage had ceased to be mortgagee and had become absolute owner, and also whether the mortgagee's advances on the footing of the mortgage had not been more than satisfied by his receipts, the bill praying for an account, and offering to allow to the mortgagee all just credits.

A purchase by a mortgagee of mortgaged property, sold either under the power of sale or in execution of a decree against the mortgagor company (obtained collusively between the mortgagee and the directors) does not operate to vest an absolute title in the mortgagee.

Where the mortgagor is a registered owner of leasehold estate in *Victoria* (under *Transfer of Land Statute*), and the mortgage is made and registered under sect. 83 and following sections, so that the only way in which the mortgagee can extinguish the rights of the mortgagor is by foreclosure under 31 Vict., No. 317, or sale under sects. 84, 85, and 87 of the *Transfer of Land Statute;* then whether a sale of such leasehold estate is made by the mortgagee under the statutory power of sale, or as absolute owner, no interest therein passes to the purchaser until registration: see ss. 42 and 87.

A mortgagee is accountable, not merely for his actual receipts whilst in possession of the mortgaged property, but also for whatever is received by

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* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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those to whom he transfers possession under an arrangement inoperative to transfer title, and in derogation of the rights of the mortgagor.

A mortgagee in possession is not chargeable with interest on his receipts if, when he took possession, an arrear of interest was due to him, unless by setting up a title adverse to the mortgagor he has lost the immunities of an ordinary mortgagee.

A mortgagee is chargeable with the full value of the mortgaged property sold if, from want of due care and diligence, it has been sold at an under value.

A mortgagee who in a redemption suit sets up and fails to prove an absolute title to the mortgaged property, and is then found to have been, at the date of suit, overpaid as mortgagee, will not only not be allowed his costs of suit but may have costs given against him.

APPEALS from two orders of the Supreme Court of *Victoria* (May 3, 1877, and Sept. 30, 1878.)

The questions decided in these appeals are as to the right of the Respondent company, under the circumstances stated in their Lordships' judgment, to impeach a sale made to the Appellant bank, and to redeem their mortgage; and also as to the terms upon which such redemption should be allowed.

The material facts of the case out of which the suit arose are stated in the judgment of their Lordships. For reports of the proceedings in the Courts below, see 2 Vict. L. R. Eq. 206; Ibid. vol. iii. 61; Ibid. vol. iv. 173.

On the 10th of May, 1876, the Respondent company filed a bill in equity against the Appellant and *William Lakeland*, which after mentioning the mortgages of the 23rd of February and the 11th of March, 1873, more particularly described in their Lordships' judgment, contained allegations to the following effect:—

(Par. 10) That no money was advanced by the bank to the company on the execution of the mortgages; that the seal of the bank was attached to those securities collusively and without lawful authority, and that in fact they were securities for former advances only.

(Pars. 11 to 15) That in July, 1874, the directors of the company without authority arranged with the bank for a sale by the sheriff of the property comprised in those securities under a *fi. fa.*; that a clerk of the solicitor of the bank, as indorsee of a promissory note of the company, brought an action on the note against the company; that the directors allowed judgment to be

obtained by default, and that the sheriff, with the concurrence or at the request of the directors acting in collusion with the bank, sold the whole of the property (subject to the mortgages) to Mr. *H. Cuthbert*, the solicitor of the bank, who in fact purchased on behalf of the bank.

(Pars. 16 to 21) That *Cuthbert* shortly afterwards sold his interest in the property to two directors of the Respondent company, on behalf of a new company, formed and incorporated as the *United Hand and Band Company* (*No liability*), who took possession.

(Pars. 22 to 27) That in February, 1875, the bank assuming to act in exercise of the powers of sale in their securities, sold the property to Messrs. *Davey Brothers;* that the said *Davey Brothers* in fact purchased on behalf of the bank, who went into possession and carried on mining operations, but in a negligent manner; that in March, 1875, all the interest of the new company was sold under a *fi. fa.* to one *John Hardy*, who assigned all his interest to the bank.

(Par. 32) That in August, 1875, the bank (as above mentioned) sold the property to the Respondent *Lakeland* for £6000, which the bill alleged to be considerably less than the value.

(Par. 36) That at the time *Lakeland* purchased the property he had notice of the several matters thereinbefore set forth, and of the rights of the Respondent company.

And the bill sought to set aside as fraudulent and void the purchase by the bank through *Cuthbert*, its solicitor, of the property in question, and all subsequent dealings therewith, and to have the same delivered to the Respondent company, and to make the bank and the Respondent *Lakeland*, or one of them, liable for all gold, or proceeds of gold received by them, or either of them, from the mine (charging the bank with wilful default) and also liable for loss by negligent working—subject to the allowance of all sums properly expended in working. The bill offered to allow to the Appellant all just credits but contained no offer to redeem.

The Appellant bank, on the 13th of July, 1876, filed an answer, and thereby stated that it advanced £10,000 to the Plaintiff company on the 7th of February, 1873, on its agreement to secure that sum by mortgage, and a further sum of £3000 on the 25th

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of November, 1873, denied all collusion with the directors of the Plaintiff company, claimed to be absolutely entitled to the mortgaged property, and denied its liability to account.

The Respondent, *William Lakeland*, on the 21st of July, 1876, filed his answer, and thereby raised substantially the same points as were raised by the Appellant.

On the 6th of December, 1876, Mr Justice *Molesworth* decreed: (1.) That the indentures of the 22nd of February, 1873, and the 11th of March, 1873, should be regarded as good securities for the amount owing from the company to the bank; (2.) That the company was entitled to redeem the lease comprised in the mortgage of the 11th of March, 1873; (3.) That the sale by the sheriff to *Cuthbert* was void as against the company, and that the bank had no title under the sale as against the company to bar the equity of redemption; (4.) That the sale to Messrs. *Davy Brothers* was void as against the company; (5.) That the sale by the bank to *Lakeland* was unwarranted as against the company, but as between the company and *Lakeland* was valid as to the plant and machinery transferred thereby, but not as to the mining lease; (6.) That the bank should be deemed liable as mortgagees in possession from the 6th of August, 1874, and should be charged with what, but for their wilful default, would have been the clear proceeds of gold raised from the property by the *United Hand and Hand Company* (*No Liability*), by the bank from the 10th of February, 1875, by *Lakeland* from the 10th of September, 1875; (7.) That the bank should also be charged with the diminution in value of the mining plant and machinery sold to *Lakeland;* (8.) An account of what was due to the bank.

On the 3rd of May, 1877, the full Court ordered that the decree should be varied by striking out therefrom the 5th declaration and inserting in lieu thereof a declaration that the sale to *Lakeland* by the bank was valid as to the plant and machinery transferred thereby, but not as to the mining lease; and also by striking out the 7th declaration. and inserting in lieu thereof a declaration that the bank in taking the said account shall be charged with what but for its wilful negligence and default would have been the clear proceeds of the sale of the plant and machinery; and also with interest on what but for such negligence and default would

have been the clear proceeds of such sale; and also with interest upon what but for such negligence and default would have been the clear proceeds of the gold raised from the land.

In pursuance of this decree the Master in Equity reported on the 1st of June, 1878, that on the result of the accounts all principal money due or owing or accruing due to the bank, and all interest thereon, was on the 1st of November, 1875, fully paid off and discharged; and that the bank was on the 31st of March, 1878, indebted to the company in the sum of £5269 6*s.* 10*d.* for principal sums and interest up to that date. On exceptions filed the sum of £6815 11*s.* was certified to be due from the bank to the company. On the 9th of August, 1878, on further consideration it was ordered by *Molesworth*, J., that the bank and *Lakeland* should give up to the company the quiet possession of the land comprised in the mining lease of the 25th of October, 1867, and the mortgage of the 11th of March, 1873, or either of them, and the mines, shafts, and drifts lying under the same; that, if necessary, an injunction should issue to put the Plaintiffs in such possession; that the Defendants respectively should do such acts and execute such instruments as might be necessary to release and convey to the company all their respective titles and claims to the said lands and mines, to be prepared at the company's expense; and that the bank should pay to the company forthwith the said sum of £6815 11*s.*, with interest thereon, at 7 per cent. per annum, from the 31st of March, 1878.

Mr. *Southgate*, Q.C., and Mr. *Cozens-Hardy*, for the Appellant bank:—

It is entirely opposed to the practice and rules of a Court of Equity to make a decree for redemption on a bill which does not pray for redemption. It is not sufficient that taking bill and answer together it appears that the suit is in substance one for redemption; the old rule is that a Plaintiff coming to redeem must offer to redeem. If a mortgagor admits a mortgage he cannot file a bill for any purpose without offering to redeem. Here the relief sought was wholly inconsistent with the right of redemption. Reference was made to *Inman* v. *Wearing* (1); *Gor-*

(1) 3 D. G. & S. 729.

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don v. *Horsfall* (1); *Johnson* v. *Fesenmeyer* (2); *Crenver Mining Company, Limited* v. *Willyams* (3); *Parker* v. *McKenna* (4); (which was said by the Court below, see 3 Vict. L. R. 67, to have overruled *Johnson's Case*, although *Johnson's Case* was never cited therein); *Hickson* v. *Lombard* (5); *Hilliard* v. *Eiffe* (6); *London and Chartered Bank* v. *Lempriere* (7); *Troughton* v. *Binks* (8); *Martinez* v. *Cooper* (9); *Parkinson* v. *Hanbury* (10); *Finch* v. *Brown* (11); *Wilson* v. *Cluer* (12); *Nelson* v. *Booth* (13); *Dunstan* v. *Patterson* (14); *Cotterell* v. *Stratton* (15); *Norton* v. *Cooper* (16).

Again, assuming that accounts ought to have been directed against the bank, still the bank ought not to have been charged except during the period in which it was itself in possession of the property. It ought not to have been charged as for wilful default or otherwise during the period in which the old company and *Lakeland* were respectively in possession. At all events, if the bank is to be held liable for receipts either by the old company or *Lakeland*, it ought also to be credited with all moneys expended by them respectively in working or developing the mine. It was further contended that *Cuthbert's* purchase of the 6th of August, 1874, was a valid purchase, and extinguished the equity of redemption; and that in any event the bank's sale to *Lakeland* was a valid exercise of the power of sale contained in the mortgages. Lastly, the bank, against which accounts were directed to be taken as mortgagee, was entitled in the character of mortgagee according to the principles of a Court of Equity to its costs of the cause. The question of costs is a legitimate subject of appeal, although the Appellate Court does not on a mere question of costs try the merits of a cause: *Chappell* v. *Purday* (17); *Attorney-General* v. *Butcher* (18).

(1) 5 Moo. P. C. 393, 409, 411, 421.
(2) 25 Beav. 88, 96, and on appeal, 3 De G. & J. 13.
(3) 35 Beav. 353.
(4) Law Rep. 10 Ch. 96, 120.
(5) Law Rep. 1 H. L. 324.
(6) Law Rep. 7 H. L. 39.
(7) Law Rep. 4 P. C. 572.
(8) 6 Ves. 573.
(9) 2 Russ. 198.
(10) Law Rep. 2 H. L. 10.
(11) 3 Beav. 70.
(12) 3 Beav. 136, 139.
(13) 3 De G. & J. 119.
(14) 2 Ph. 341.
(15) Law Rep. 8 Ch. 295.
(16) 5 D. M. & G. 728.
(17) 2 Ph. 227.
(18) 4 Russ. 180.

Mr. *Joshua Williams*, Q.C., and Mr. *J. D. Wood*, for the Respondent company:—

No decision has been cited on the other side to the effect that a Court of Appeal will set aside a decree for redemption simply on the ground that the Plaintiff did not ask for redemption in his bill. The only authority to that effect is a dictum of Lord *Eldon's* in *Martinez* v. *Cooper* (1), which it is submitted is not sufficient. The cases cited on the other side are distinguishable from this, for here the bill does much more than seek to set aside the mortgages as invalid. It seeks also, even if the mortgages are held valid, to set aside several collusive arrangements, and pretended and fictitious sales subsequently entered into. A mortgagee who has thus endeavoured to defraud his debtor, and and is shewn moreover on the evidence and Master's report to have been considerably overpaid at the date of suit, cannot fall back upon the character of creditor and mortgagee and avail himself of a technical defence and benefit which might have belonged to him in that character. Reference was made to *Incorporated Society* v. *Richards* (2).

As regards the bill of sale to *Cuthbert* on the 24th of August, 1874, which followed the collusive action, judgment, and sheriff's sale of that year, it was, independently of the collusive character of the whole transaction, inoperative as regards the leasehold by reason of the *Transfer of Land Statute*; see sects. 42, 84, 106. No evidence was given that the Registrar of Titles was served with a copy of the writ of *fieri facias* (see sect. 106). The bill of sale was registered under the 7th part of "the *Instruments and Securities Statute*, 1864;" but not under the *Transfer of Land Statute*, and is not according to any of the forms set out in the 15th schedule to that Act. As regards the sale to *Lakeland*, that was submitted to be invalid as between the bank and the company, at any rate as regards the leasehold. See sect. 85 of the said Statute. No proper notice was given either under sect. 84 or sect. 85. *Registrar of Titles* v. *Paterson* (3). Whatever title *Lakeland* might be able to assert, the company must be placed as far as possible in the same position as regards the bank as if such

(1) 2 Russ. 198. (2) 1 D. & War. 258, 334.
(3) 2 App. Cas. 110, 116, 117.

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sale had never taken place: *Smith* v. *Harrison* (1). As regards the correctness of the principle on which the accounts were taken in the matter of sale proceeds and interest, see *Montgomery* v. *Calland* (2); *Quarrell* v. *Beckford* (3). As regards costs, the decree is right in holding that the mortgagee had by its conduct disentitled itself to costs.

Mr. *Eddis*, Q.C., and Mr. *Shebbeare*, for the Respondent *Lakeland*:—

The mine is no longer capable of being worked to a profit, and its possession is of no value. *Lakeland* has no interest in disputing the orders appealed against declaring the invalidity of his purchase so long as he is not held liable for the proceeds of gold obtained by him during his mining operations nor for negligent working. The orders were correct in declaring the sale to him of the plant and machinery valid, and in not holding him liable as aforesaid. He was a *bonâ fide* purchaser for value without notice of any of the company's rights to impeach the validity of the sale.

Mr. *Southgate*, Q.C., replied.

J. C. 1879 *June* 14.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

The company which is the first of the Respondents in this appeal, and which will, throughout this judgment, be designated as "the company," was incorporated on the 18th of October, 1866, under the provisions of a colonial statute, the *Mining Companies Limited Liability Act*, 1864, for the purpose of working certain mines at *Ballarat*. The *National Bank of Australasia* (the Appellant) which will hereafter be spoken of as "the bank," had a branch at *Ballarat*, and were the bankers of the company. In 1873 the then directors of the company caused to be executed under its common seal two securities in favour of the bank. The first of these was an indenture bearing date the 22nd of February,

(1) In the Privy Council, 41 L. J. (P.C.) 34; 20 W. R. 594; 27 L. T. (N.S.) 188; below, 6 Wy. W. & A'B. (Eq.) 182; 3 Aust. Jur. 44.
(2) 14 Sim. 79.
(3) 1 Maddock, 269.

1873, which, after reciting a resolution of the shareholders of the company empowering the directors to borrow money not exceeding £20,000, and an agreement between the directors, purporting to act in pursuance of the powers given to them by that resolution, and the bank for an advance of £10,000, and for having the repayment of that advance with all further sums in which the company might thereafter become indebted to the bank, with interest at the rate of 7 per centum per annum, secured in manner hereinafter appearing, and also by an assignment by way of mortgage of the leasehold property of the company bearing even date therewith, assigned, by way of mortgage, the plant and machinery thereby specified. This deed fixed no time for the repayment of the sums secured, but contained a power of sale, expressed in the fullest terms, which the bank was to be at liberty to exercise if the company should make default in payment after service upon it of a demand in writing under the hand of the manager or acting manager of the *Ballarat* branch of the bank.

The second security, being the further security mentioned in the indenture of the 22nd of February, was not executed until the 11th of March in the same year. It was an instrument of mortgage of the leasehold estate therein described of which the company was the registered proprietor under the provisions of the *Transfer of Land Statute*, otherwise known as Act No. 301; and it was, with one variation that will be hereafter noticed, in the form prescribed for mortgages by that statute, and was duly registered on the 16th of April, 1873. The property comprised therein will be henceforth called "the mine."

In 1876 the company instituted against the bank and the Respondent *Lakeland*, a purchaser from the bank of the mortgaged property, a suit of which the nature will hereafter be considered. On the 6th of December in that year Mr. Justice *Molesworth* made an interlocutory decree which, amongst other things, directed an account to be taken against the bank as mortgagees in possession. The full Bench of the Supreme Court of *Victoria* affirmed, with some slight variations, the decree of Mr. Justice *Molesworth* by a decree, dated the 3rd of May, 1877. Against this last decree the bank obtained leave to appeal on the 16th of May in that year. That appeal is the first of those of which their Lordships have now to

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dispose. Pending it, the accounts directed by the decree were taken in the Master's office; and on the 9th of August, 1878, an order on further directions was made by Mr. Justice *Molesworth*, which on appeal was affirmed by the full Court by its order of the 30th of the following month. The second appeal to Her Majesty is against this last order.

The two appeals, though heard together, will be considered separately. The first and principal objection taken to the interlocutory decree is that inasmuch as the company, by its bill, impeached the validity of the mortgage securities which the Court affirmed, no decree ought to have been made in the suit except one of dismissal without prejudice to the Plaintiff's right to bring a regular suit for redemption. In support of this contention the learned counsel for the bank relied upon the rule of Courts of Equity to this effect, which they insisted was established by the case of *Troughton* v. *Binks* (1), *Martinez* v. *Cooper* (2), *Gordon* v. *Horsfall* (3), *Inman* v. *Waring* (4), *Johnson* v. *Fesenmeyer* (5), and *Crenver Mining Company* v. *Willyams* (6).

Their Lordships do not dispute the authority of these cases, but conceive that the present is distinguishable from them, and does not fall within the somewhat strict and technical rule affirmed and enforced in them. It will be found in all of them, if examined, that whilst on the one hand the Plaintiff impeached the mortgage securities, the Defendant on the other insisted on his rights as mortgagee and on nothing more; and that the relation of mortgagor and mortgagee having been established, the Court held that the Plaintiff could not be allowed to have a decree for redemption on a bill which disputed the existence of that relation, and contained no prayer for redemption. The rule is treated as a privilege incident to the character of mortgagee, which the Defendant had throughout admitted and insisted on. But what is the present case? The bill, admitting the execution of the mortgages, insists that such execution was *ultra vires* the then directors, and prays that they may be declared void as against the company; but it also states, and impugns as fraudulent and void against the com-

(1) 6 Ves. 573.
(2) 2 Russ. 198.
(3) 5 Moo. P. C. 393.
(4) 3 De G. & Sm. 729.
(5) 25 Beav. 88.
(6) 35 Beav. 353.

pany, a series of transactions the effect of which, if valid, would be to destroy the company's right of redemption, and to convert the title of the bank from a mortgage into an absolute title. The 28th paragraph moreover contains a direct statement that the sums advanced by the bank upon the mortgages had been more than satisfied by the value of the gold obtained by them from the mine. And the bill prays, amongst other things, that all the impeached transactions may be declared void as against the company; that possession of the mine, and of so much of the plant and machinery as remains in the possession or control of the Defendants, may be restored to the company; and that an account may be taken of all gold, or the proceeds thereof, received by the bank, or which but for their wilful default might have been received from the mine, and of the proceeds of any machinery and plant sold by the Defendants, and for payment of what may be found due on taking the account together with interest thereon, "the Plaintiff offering and undertaking to pay or allow to the Defendants all sums properly expended by them respectively in the working of the said mine, for the substantial benefit of the property, and also *all other just credits;* and that all proper and necessary accounts may be taken, and all necessary directions given."

The bank by its answer, not relying wholly on its title as unpaid mortgagee, with all the privileges as well as liabilities incident thereto, maintained the validity of the transactions subsequent to the mortgages which were impeached by the bill; alleged that under the circumstances thereinbefore appearing it became absolutely entitled to the property comprised in the mortgages; submitted that it was not liable to account to the company, or to any other person, for its dealings therewith, or for the proceeds of the sale of any of the said property; and denied that the Plaintiffs had any title to, or right, or interest in the property the subject of the suit, or the accounts thereby sought.

From this statement of the somewhat loose and informal pleadings in the cause, it plainly appears that the issues raised between the company and the bank were not merely mortgage or no mortgage, but further, whether, by means of its acts subsequent to the impeached mortgage the bank had ceased to be mortgagees, and

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had become absolute owners. The Court was bound to try all those issues. The dismissal of the suit might have been taken to affirm the title set up by the bank generally, or would at least have left its claim to more than a mere mortgage title, subject to redemption, open to future litigation. Again, if the company, as the Court observed, failed to establish its right to have the mortgages set aside, but succeeded on all the other issues, the result was only to modify the relief prayed by the bill, and it was obviously necessary to direct the accounts ancillary to that modification in order to ascertain whether, as alleged by the bill, the bank's advances on the footing of the mortgages had been more than satisfied by their receipts, or whether there was still any balance due to them in respect of those advances. Their Lordships are, therefore, of opinion that the rule invoked does not apply to such a case as the present, and conceive that they are in some measure supported in that opinion by the cases of *Montgomery* v. *Calland* (1) and *The Incorporated Society* v. *Richards* (2), which will be hereafter noticed with respect to the other questions raised at the hearing of these appeals. They prefer to rest their judgment on this point upon the distinction taken above, rather than upon the general principle upheld in *Parker* v. *M'Kenna* (3), *The London Chartered Bank* v. *Lempriere* (4), and *Hilliard* v. *Eiffe* (5), because those decisions relate to what should be done on the failure of the Plaintiff to prove allegations of fraud in general cases, whereas the rule invoked by the bank in this case is one based upon the relation of mortgagor and mortgagee. The principle, however, of these decisions, so far as it is applicable to this case, is in favour of the company.

Assuming, then, that the bill ought not to have been dismissed on the ground suggested, their Lordships have to consider whether the questions determined in favour of the company were correctly so determined, and whether the decree based on such findings was incorrect either in substance or in form.

Little, if anything, was urged at the Bar by way of argument to shew that the declarations of this decree touching the

(1) 14 Sim. 79.
(2) 1 D. & War. 158.
(3) Law Rep. 10 Ch. 96.
(4) Law Rep. 4 P. C. 572.
(5) Law Rep. 7 H. L. 39.

transactions subsequent to the execution of the mortgages were incorrect.

The first of these transactions is the execution sale to *Cuthbert* in trust for the bank on the 6th of August, 1874, which is the root of the title set up by the bank to an absolute interest in the mortgaged property. The facts proved as to this were the following. In the preceding month of July the company, being indebted to the bank in the sum of £15,384, and being otherwise, as it would seem, in an unprosperous condition, a scheme was set on foot for the formation of a new company, for the issue of new shares the proceeds whereof were to be applied partly in reduction of the debt to the bank, and for vesting the property, subject to the mortgage, in this new company. This, of course, could not be legitimately effected except with the consent of the requisite number of shareholders ascertained by proceedings duly had under the provisions of the deed of association of the company. No such proceedings were had. The course of action adopted was to cause the company's interest in the mortgaged premises to be seized and sold in execution in a collusive action, the proceedings wherein were previously arranged between the then directors of the company and their solicitor, and the manager (*Robson*) and the solicitor (*Cuthbert*) of the bank, the purchaser at the execution being *Cuthbert*, as trustee for the bank. One reason why the bank thus became purchaser seems to have been the apprehension that any stranger who purchased might question the validity of the mortgages. The bank, through *Cuthbert*, afterwards transferred the interest purchased at the execution sale to trustees for the new company, receiving from the latter the sum of £3400 in reduction of the balance due upon the mortgage.

It is clear that by these collusive proceedings the bank could obtain no good title against the company, and that the Supreme Court of *Victoria* was right in so declaring. But it is equally clear (and this is material to one question raised touching the form of the decree) that, although the ultimate object of the contrivance was to substitute the new for the old company as mortgagors, with a right of redemption, the effect of the proceedings, if valid, would have been to vest the interest of the old company, *i.e.*, the equity of redemption, in the bank between the date of the

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execution sale and that of the subsequent transfer to the new company, and to make them absolute owners of the mortgaged premises during that period. That this has been the view of its rights taken by the bank is shewn by the third of its grounds of appeal from Mr. Justice *Molesworth* to the Full Bench of the Supreme Court of *Victoria*, and by the first of the "reasons" of its case in this appeal.

The next material act of the bank was the issue of the notice of the 10th of February, 1875 (the terms and effect of which will be afterwards considered). This was somewhat inconsistently served upon the old as well as upon the new company.

Then came the proceedings of the 5th of March, 1875, under which the mortgaged premises were put up for sale, as under the powers of sale contained in the indenture of assignment and instrument of mortgage, and knocked down to the Messrs. *Davey*. This transaction has also been declared by the decree to be void as against the company. A question has been raised whether it was an actual sale, or a mere buying in of the property put up for sale. In neither view can it have had any effect on the right of the company. On the second hypothesis it would necessarily leave the rights of all parties as they were; on the first, the sale would be impeachable by the company, on the ground that the *Daveys* were merely nominal purchasers on behalf of the bank, who, as mortgagees selling under their power of sale, could not sell to themselves.

The last and most important transaction to be considered is the sale to *Lakeland*, both of the plant and machinery and of the mine, for one lump sum of £6000, under the memorandum of agreement of the 15th of September, 1875. Mr. Justice *Molesworth* held that this sale was unwarranted as between the company and the bank; but as between the company and *Lakeland* was valid as to the plant and machinery, but not as to the mine. The full Court, however (and, there being no cross appeal, its decision on this point must be accepted as final), held that, as between all parties, the sale was valid as to the plant and machinery, but not as to the mine. The question, therefore, is reduced to that of the validity of the sale of the mine.

Mr. Justice *Molesworth*, being doubtless more familiar than we

are here with the provisions of the *Transfer of Lands Statute*, and their application, summarily disposed of this question by saying, "I do not think the bank effectually sold *Lakeland* the mining lease. It could only make title under 301, and did not." This point, however, having been raised at the Bar with some distinctness, at least in Mr. *Southgate's* reply, their Lordships will deal with it more in detail.

It is not immaterial to consider in what character the bank was dealing with *Lakeland* in this transaction. On the face of the agreement of the 15th of September, 1875, they do not purport to be acting as mortgagees exercising a power of sale. According to their case, they were then the absolute owners of the mine, inasmuch as whatever right of redemption had existed in the old company had been extinguished by the sale to *Cuthbert* in 1874, and whatever right of redemption had ever existed in the new company had been extinguished by the execution proceedings taken in March, 1875, against that company (which thenceforth disappeared from the scene), and by the subsequent assignment from *Hardy* to the bank. It is hardly necessary to observe that a sale of the mine by the bank in the character of absolute owners, which, as between them and the company, they did not possess, could not pass a good title against the company.

If however *Lakeland*, to use Mr. Justice *Molesworth's* expression, is "entitled to the benefit of all the muddled titles and powers which the bank had to convey to him," and the sale is to be treated as made by the bank in exercise of the power given by the instrument of mortgage, the transaction is impeachable upon other grounds. The company was the registered owner of the mine under the provisions of the *Transfer of Land Statute*, and the mortgage was made under and subject to the provisions of the 83rd and following sections of that Act, and was duly registered thereunder. The instrument itself is in the form set forth in the 12th schedule to the Act, except that it contains, as that form permits, a special covenant or agreement, which will be hereafter considered. Hence the only way in which the mortgagee could extinguish the rights of the mortgagor in the mine was by foreclosure, under 31 Vict. No. 317 (of which there is no question here), or by a sale under the 84th, 85th, and 87th sections of the *Transfer*

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of Land Act. The 84th section provides that if the mortgagor shall make default in payment of the principal sum or interest, and such default shall be continued for one month, or for such other period of time as may therein for that purpose be expressly fixed, the mortgagee may serve on the mortgagor, in the manner therein specified, notice in writing to pay the money owing on the mortgage. The 85th section provides that if such default shall continue for one month after the service of such notice, or for such other period as may in such mortgage be for that purpose fixed, the mortgagee may sell the land, giving him ample powers and discretion as to the mode of sale, and providing that no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale. The 87th section provides that, upon the registration of any transfer signed by a mortgagee for the purpose of such sale as aforesaid, the estate and interest of the mortgagor in the land therein described at the time of the registration of the mortgage, shall pass to and vest in the purchaser, freed and discharged from all liability on account of the mortgage, &c.

The special clause in the instrument of mortgage was to the effect that, notwithstanding anything contained in the *Land Transfer Act*, it should be lawful for the bank in the event of default being made in the payment of the principal money and interest secured "on such demand being made as aforesaid," immediately to serve such notice of demand as aforesaid in the manner prescribed by the 84th section of the statute on the company, and, after the expiration of fourteen days from the service of the notice of demand, to sell the land in pursuance of the powers in that behalf vested in the mortgagee under the 85th section of the statute.

It has been argued that the demand of the 10th of February, 1875, was the only notice of demand which, under this clause, was requisite in order to support a sale made fourteen days after this service in pursuance of the statutory power. The clause is not very clearly worded, but their Lordships cannot agree in this construction of it. A demand was necessary in order to fix the time of payment. Until its service there could be no default, and it may be further remarked that the demand actually served

makes no reference to the statutory mortgage of the mine, but merely specifies, as the consequence of the failure to make payment forthwith, that the bank will proceed to exercise all or such of the powers contained in the bill of sale (of the chattels) as it shall see fit. The clause in question seems to their Lordships expressly to require service of some notice of demand to be made after default in payment. It may qualify the 84th section by allowing that notice of demand to be served immediately instead of "one month" after default, and the 85th section by allowing the sale to be made fourteen days instead of one month after service of such notice, but it does no more. It does not deprive the mortgagor of the right to have a notice of demand served upon him, after he is in default, as a necessary preliminary to a sale under the statutory power. From a case recently before their Lordships (*Campbell* v. *Commercial Bank of Sydney*), which arose upon similar provisions in a *New South Wales Act*, it may be inferred that, upon an application to complete the title of the purchaser by registration under the 87th section, an objection on the ground of the failure to serve a proper notice of demand might, and probably would, have been taken by the Registrar. Again, it follows from both the 42nd and the 87th sections of the Act under consideration, that, whether the transaction with *Lakeland* be regarded as a sale by absolute owners or as one by mortgagees under the statutory power, no interest in the mine could effectually pass to the purchaser until registration, and consequently that the agreement of the 15th of September, 1875, was a mere agreement for sale which, whatever equities it created between the bank and *Lakeland*, left the prior equity of the company untouched.

Their Lordships have now to deal with the particular objections taken to the form of the decree. In order to estimate the weight of these, it will be well to consider what was the general nature of the decree to be made in a suit so framed, and upon the facts so found. The suit was in the nature of an equitable ejectment, in which each party claimed an absolute interest in the property, for the profits of which the bill sought an account. The Court, taking an intermediate view of the rights of the parties, found that the relation of mortgagor and mortgagee originally subsisted

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between the parties, and had never been effectively determined; that the transactions on which the bank relied as making their title absolute were void against the company; that consequently it was necessary to take an account of what, if anything, remained due upon the mortgage, and to ascertain whether, as alleged by the company, the bank's charge had been satisfied when the bill was filed.

To such a state of things the observations of Lord *St. Leonards*, in the case of the *Incorporated Society* v. *Richards* (1), apply. When pressed to give the Defendants the advantages of a mortgagee in an ordinary suit for redemption, he said, "This is a peculiar case, and cannot be treated as the ordinary case between mortgagee and mortgagor. Here you set up a title adverse to the owner; and when a creditor denies his character as such, and claims as owner, I cannot allow him to fall back on his original character of creditor, as if he had never departed from it. I will never allow a party, who has put the owner at arm's length, to turn round, when defeated, and claim all the benefits attached to the character of a fair creditor."

The particular objections to the form of the interlocutory decree will now be considered in detail. The first was that it charges the bank as mortgagee in possession from the 6th of August, 1874, the date when *Cuthbert* took possession of the mine. This objection was but faintly pressed, since it is obviously for the interest of the bank that the account should cover the period between that date and February, 1875, when the bank resumed actual possession, inasmuch as the yield of the mine whilst the new company worked it was worth only £7 19*s.*, whilst the sums allowed for disbursements during the same period, and for which the bank got credit in account, amount to £4256 5*s.* 6*d.* In any case, however, the direction appears to their Lordships to be correct, because it is consistent with the facts established, and with the claim of the bank to an absolute title in the mine as against the company from the date of the sheriff's sale to *Cuthbert*.

The second and third objections were that the decree erroneously treats the bank as chargeable with the value of the gold obtained,

(1) 1 D. & War. 334.

first, by the new company, and secondly, by *Lakeland*. Their Lordships are of opinion that the bank was properly so treated. As mortgagees in possession they were admittedly accountable, not only for their actual receipts, but for what but for their wilful default they might have received. And it appears to their Lordships that whatever was received by those whom it has been found the bank put into possession without just title, and in derogation of the company's rights, has correctly been held to fall within this category.

Another objection taken to the decree was that, as varied by the full bench, it made the bank chargeable with interest on the principal moneys for which it was held accountable. And the learned counsel for the bank relied much upon the general rule affirmed in *Nelson* v. *Booth* (1), to the effect that a mortgagee in possession is not chargeable with interest on his receipts if, when he took possession, an arrear of interest was due to him. This, however, as has been shewn, is not an ordinary redemption suit, and the before cited case of the *Incorporated Society* v. *Richards* (2) is a clear authority that in an exceptional case like this the Defendant cannot claim the immunities of an ordinary mortgagee. There Lord *St. Leonards* ordered the account to be taken with annual rests. Such a direction, though more usual, is in terms less favourable to the Defendant than that contained in the decree under appeal, which amounts only to one that interest be allowed on both sides of the account. That it was competent to the Court in the circumstances to give such a direction their Lordships entertain no doubt. The question whether the Master has correctly calculated interest under that direction was one which could only be raised on an exception to his report, and the bank filed no exceptions thereto. Their Lordships may, however, remark that he seems to have acted correctly in allowing compound interest with half yearly rests on the mortgage debt, that debt being the balance of a current banking account kept in that way; and that, if the interest was to be so calculated on one side of the account, it ought, by parity of reason, to be calculated in the same way on the other side. Whether the bank ought to have been charged with compound interest on the balance found due from it to the

(1) 3 De G. & J. 119. (2) 1 D. & War. 334.

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company on the 31st of March, 1876, after that date is, perhaps, a question which might have been successfully raised by an exception to the report. But it was not so raised. Another objection taken was that the interlocutory decree, instead of directing, as in an ordinary redemption suit, the taxation of the bank's costs, and the addition of the certified amount of them to the amount due for principal and interest on the mortgage, reserved the consideration of them until after the taking of the account. It is sufficient on this to say that in a suit of this character such a reservation was, in their Lordships' judgment, within the discretion of the Court, and consistent with usual practice. Whether the Court, under the reservation, was right in making the order as to costs which it made on further direction, is a question which will be considered on the other appeal. That the costs of the first appeal to the full Court were within the discretion of that Court their Lordships have no doubt. Nor would they see any grounds for impeaching the soundness of the particular exercise of that discretion were it proper to entertain an appeal on that ground.

An objection on which their Lordships have felt greater difficulty is that taken to the direction in the decree, as finally drawn up, that the bank should be charged with "what but for its wilful negligence and default would have been the clear proceeds of the sale of the said plant and machinery."

The bill, which is loosely drawn, made no special case as to the sale of the plant and machinery at an undervalue, otherwise than by alleging in the 35th paragraph that the sum of £6000 was considerably less than the value of the *mine and property* sold to *Lakeland*, as the bank well knew, and that a larger sum had been, previously to the sale to *Lakeland*, offered for the said property; and as to the plant and machinery prayed only for an account "of the proceeds of any machinery or plant sold by the Defendants or either of them;" saying nothing about negligence or wilful default.

Some evidence was, however, given at the hearing touching an offer of £8000 for mine and plant, and the value of the latter; and Mr. Justice *Molesworth*, coming to the conclusion that the whole of the transaction with *Lakeland* was fraudulent and void as against the company, decreed that the bank should be charged

"with the diminution of the value of the mining plant and machinery caused by its selling in excess of its replacing; and with the full value of the mining plant and machinery sold to *Lakeland*." His decree, therefore, so far as it related to the plant sold to *Lakeland*, was consistent with his finding; and it cannot be said that there was not some evidence to support both. The difficulty, however, arises on the decree as modified by the full Court. Their judgment says, on this point, "We think, however, that the decree must be varied. We consider that the sale of the chattels was not unwarranted, and that the bank ought not to be charged with the value of the plant, &c.;" and, after dealing with the notice of demand and its effect, adds, "the declaration that the sale to *Lakeland* was unwarranted as against the Plaintiffs, and that the bank should be charged with the diminution in value of the mining plant and machinery comprised in the mortgage, must both be omitted, but the bank must be charged with what but for wilful negligence and default would have been the clear proceeds of the sale of the plant and machinery." And the decree was varied accordingly. At first sight the first passage cited from this judgment seems to be inconsistent with what follows, and with the decree; but upon consideration their Lordships are of opinion that the words "the bank ought not to be charged with the value of the plant, &c.," must be taken to refer to the higher value of the plant and machinery before the diminution of that value by the cause contemplated by Mr. Justice *Molesworth*, and that the learned Judges did not thereby intend to overrule Mr. Justice *Molesworth's* conclusion that the plant sold to *Lakeland* was sold for less than its true value.

There was no *constat* of what was actually received by the bank from *Lakeland* in respect of the plant, one lump sum of £6000 having been paid for both mine and plant, and some inquiry on this point was therefore necessary. If the Court were satisfied that the price paid for both subjects was a fair one, the proper inquiry was, of course, how much of the £6000 was attributable to the price of the mine, and how much to the price of the plant. On the other hand, if it had grounds for supposing that the plant had been sold at an undervalue owing to the want of due care and diligence, the ordinary reference to the Master would be to charge

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the Defendants with what but for their wilful negligence and default might have been received. The full Court appears to have corrected the judgment and decree of Mr. Justice *Molesworth* by substituting this direction for his direction to charge the bank with the full value of the plant and machinery, a change in favour of the Defendants.

Upon the whole, their Lordships have come to the conclusion that the full Court, as well as Mr. Justice *Molesworth*, had sufficient grounds for holding that the plant might have been sold for less than could have been obtained for it, regard being had to the 35th paragraph of the bill, to the evidence in the cause, and to the conduct of the bank in selling for one sum that which they had a right to sell with that which they had no right to sell. They are therefore of opinion that the appeal against the interlocutory decree wholly fails.

Little need be said on the second appeal. It has already been remarked, that if the interlocutory decree is right no question can be raised as to the accounts taken under it, inasmuch as the bank filed no exception to the Master's report. The case is still stronger against the bank on this point, for it appears from Mr. Justice *Molesworth's* judgment that the Plaintiffs having filed exceptions, of which some were allowed, the Defendants consented that instead of sending the case back to the Master, the Court should draw up an order as of the 22nd of July, 1878, fixing the amount due from the bank at £6815 11*s*. The only question that remained was, what was to be done as to the costs of the suit. Now not only had the bank set up, and failed to prove, a title to an absolute interest in the property, not only had it sought to destroy the right of its mortgagor by a series of very questionable transactions, but it had then been found to have been overpaid, in its character of mortgagee, when the bill was filed. These circumstances were amply sufficient to deprive it of the ordinary right of a mortgagee to the costs of suit, and to bring the question by whom the costs were to be borne within the discretion of the Court. Their Lordships can see no ground for interfering, contrary to the ordinary practice of this tribunal, with that discretion, and must therefore humbly advise Her Majesty to affirm the decree of the 3rd of May, 1877, and the decretal

order of the 30th of September, 1878, and to dismiss these appeals with costs.

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Solicitors for the Appellant: *Wadeson & Malleson.*
Solicitor for the Respondent Company: *Thomas Randall.*
Solicitor for Respondent *Lakeland: Brundrett, Randall, & Govett.*

[PRIVY COUNCIL.]

LONDON CHARTERED BANK OF AUSTRALIA . . . . . } DEFENDANT;

AND

WHITE AND OTHERS . . . . . PLAINTIFFS.

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ON APPEAL FROM THE SUPREME COURT OF VICTORIA (IN EQUITY).

Banker's Lien—Accounts—Interest.

Bankers most undoubtedly have a general lien on all securities deposited with them as bankers by a customer, unless there be an express contract or circumstances that shew an implied contract inconsistent with the lien.

Brandao v. *Barnett and Others* (1) approved.

Held, that the bankers having acquiesced in the finding of the first Court, that the securities deposited with them were in respect of specific sums and not on the general account, and not having objected thereto in their grounds of appeal to the Supreme Court, were precluded from raising that question in appeal to the Privy Council.

Simple interest only should be allowed on such specific amount, as to a mortgagee.

Bankers improperly or without title retaining moneys overpaid to them as mortgagees are chargeable with interest thereon.

APPEAL from an order of the Supreme Court (Sept. 21, 1877), affirming with certain variations an order of Mr. Justice *Molesworth* (May 11, 1877).

The principal question sought to be raised in this appeal was,

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 3 C. B. 531; 12 Cl. & F. 787.

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whether certain securities placed by a customer in the hands of the bank ought to be treated as a security for the customer's general account with the bank, or whether they are to be considered as applicable only to the particular advance on the occasion on which they were given.

The Appellant bank was incorporated by royal charter, and in the year 1858 one *Hugh Glass* was its customer. He continued so until his insolvency in 1869. The relations between them of banker and customer were ultimately determined by an assignment made by *Glass* of his estate and effects for the benefit of his creditors on the 3rd of December, 1869.

The facts of the case and the agreements entered into between *Glass* and the bank are set out in the judgment of their Lordships.

The suit was instituted on the 8th of June, 1876, by the Respondents the *Whites*, as second mortgagees of "the *Clare Stations* and stock," against the bank, as first mortgagees thereof and of the "*Nouranie* run," and the Respondents *Blackwood* and *Ibbotson*, as second mortgagees of the "*Nouranie* run," to have their respective rights as mortgagees of the said properties ascertained and determined. The nature of the suit is more particularly set forth in their Lordships' judgment. Other Respondents, *Nash* and *Moore*, were added as Defendants, as being, in manner appearing in the suit, entitled to the equity of redemption of the properties.

By the decree dated the 11th of May, 1877, it was ordered that it be referred to the Master to take an account of the mortgage debt due to the bank, taking it as on the 1st of July, 1869, as £40,000, bearing interest at £8 per cent., and of the sums received by the bank in satisfaction thereof as mortgagee in possession, and as sellers of the corpus of the securities of *Clare* stations and the stock thereon, and the *Nouranie* station; and it was ordered that in taking the account the bank have credit over all expenses and disbursements for the purchase-money of the freehold of part of the last-mentioned station, and be charged with the price received on the sale thereof; and it was also directed that the account be taken with convenient rests reducing principal, but that no interest upon interest be allowed; and it was declared that on taking the

accounts the bank was not to be allowed anything for costs and expenses connected with the conveyance of the 3rd of December, 1869, or for payments made to creditors of *Glass* in arranging for the conveyance (without prejudice to any other remedies which the bank might have for recovering the same); and it was directed that the bank should not be allowed in that account for any costs in a suit in the Supreme Court of *New South Wales* in the bill referred to; and the Master was directed in taking the account to allow the bank disbursements and expenses for the *Clare* stations and stock paid and furnished by the Plaintiffs, as well as those made and paid by itself, and to fix the time when, according to the accounts, the bank should be deemed to be overpaid, and to compute the sum which the bank should be deemed to be overpaid, charging it with interest on that overpayment, and all subsequent clear receipts at the rate of 8 per cent. per annum to the making of his report; and the Master was also directed to take the above accounts, not giving the bank credit for disbursements paid and furnished by the Plaintiffs; and it was declared that the Plaintiffs were entitled to the difference of the results of the two accounts; and it was declared that the Plaintiffs should be treated as subject to pay the costs of the bank properly incurred in defending the suit in *New South Wales* above referred to, not recoverable from the Plaintiffs therein; and it was referred to the Master to ascertain the same; and it was directed that the last two sums be set off one against the other; and it was declared that the Plaintiffs and the Defendants, *James Blackwood* and *Charles Ibbotson*, were entitled to have the sum which might remain in the hands of the bank according to the first account, subject to such costs as might be made payable thereout, divided according to the direction next following. And it was declared that the bank should have been paid its debt of £40,000 and interest out of the *Clare* stations and sheep and the *Nouranie* stations rateably, according to their respective values as might appear by the sums actually realised thereout respectively by the possession and sales thereof, and having regard to interest as to the different dates of the receipt of such sums; and it was referred to the Master to take an account of the sums contributed to the payment of the debt by the properties respectively over and above the sums

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which they should have contributed, and according to the result to appropriate the said balance between them; and by consent it was directed that thenceforth the bank should hold £4239 17*s.* 1*d.* of the sum then in its hands at interest at the rate of £4 per centum per annum for six months from the date of the decree, instead of at the rate of £8 per centum, without prejudice to the right of the parties to dispute the sum due, and further consideration and costs were reserved.

The bank appealed, and the Supreme Court was divided in opinion as to whether the banking account could be considered as covered by the securities of the 8th of April, 1868. By the order on appeal, dated the 21st of September, 1877, it was ordered that the appeal be allowed, and that the decree be varied by striking out so much thereof as declared that on taking the accounts the bank was not to be allowed anything for costs and expenses connected with the conveyance of the 3rd of December, 1869, or for payment made to creditors of *Glass* in arranging for the conveyance without prejudice as therein mentioned. And it was referred to the Master to inquire and report whether the bank ought to be allowed any and what sum for such costs, expenses, and payments as aforesaid as against the Plaintiffs and the Defendants, *James Blackwood* and *Charles Ibbotson*, or any and which of them; and it was ordered that the decree be further varied by striking out so much thereof as directed the Master to charge the bank with interest on the overpayment to the bank therein mentioned, and on all subsequent clear receipts at the rate of £8 per cent. per annum to the making of his report, and in lieu thereof the Master was directed to charge the bank with interest at the rate aforesaid on so much only of the overpayment as the bank had theretofore claimed to retain as mortgagee, but to which, on taking the accounts directed by the decree, the bank should appear not to be entitled; and with these variations the Court affirmed the decree, and the Court did not think fit to give the costs of the appeal to any of the parties appearing therein.

Mr. *Kay*, Q.C., and Mr. *Macnaghten*, for the Appellants:—

The order appealed from ought to be varied by declaring that the bank had a general lien on the securities of the 8th of April,

1868, placed in their hands, and could hold the same against the balance from time to time owing by *Glass* on his general account: *Brandao* v. *Barnett* (1); *Jones* v. *Peppercorne* (2), where it was held that the general lien of a banker is not excluded by a special contract unless the terms of that special contract are inconsistent therewith: *Johnston's Case* (3); *Mosse* v. *Salt* (4); *Agra Bank Case* (5); *Ex parte Trethowan, Ex parte Tweedy* (6). Here there was no contract, expressed or implied, inconsistent with the bank's lien. Therefore whatever was due to the bank by *Glass* before the notices of the 3rd of June and 27th of July, 1869, was secured by the deposits in their hands on which the bank had a general lien. After those notices the bank, of course, could not charge against the subsequent mortgagees advances made thereafter: *Hopkinson* v. *Rolt* (7).

With regard to the claim of the bank to make half-yearly rests converting interest into principal: see *Fergusson* v. *Fyffe* (8); *Crosskill* v. *Bower* (9); *Williamson* v. *Williamson* (10); *Rufford* v. *Bishop* (11). With regard to the items of costs, it was submitted that as regards the rival claimants to the surplus proceeds arising from the securities either could have taken interpleader proceedings, while the bank could not pay either of them until their rights were adjusted by the Court. The bank was not chargeable or charged with misconduct, and there was no ground for depriving the bank of costs, or for reserving the costs to abide the result of the accounts. *Cotterell* v. *Stratton* (12). Nor was there any ground for charging the bank with interest on any part of the surplus proceeds in its hands. It was also contended that the bank was entitled to the full costs of defending its securities in the suit brought by *Blackwood* and *Ibbotson*.

Mr. *Southgate*, Q.C., and Mr. *Cecil Russell*, for the Respondents:—

The securities of the 8th of April, 1869, could not be charged in

(1) 3 C. B. 531; 12 Cl. & F. 787.
(2) Joh. 430.
(3) L. R. 6 Ch. Ap. 212.
(4) 32 Beav. 269.
(5) Law Rep. 8 Ch. 41.
(6) 5 Ch. D. 559.
(7) 9 H. L. C. 514.
(8) 8 Cl. & F. 139.
(9) 32 Beav. 86.
(10) Law Rep. 7 Eq. 542.
(11) 5 Russ. 346.
(12) Law Rep. 8 Ch. 295.

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favour of the bank with any principal moneys other than the original loan of £40,000, and one moiety of the sums expended for working expenses in carrying on the *Clare* stations. Securities taken in the manner and on the terms upon which these were taken exclude the general lien: see *Mosse* v. *Salt* (1) and analogous cases, where it has been held that solicitors taking securities for special purposes have lost their general lien: *Vaughan* v. *Vanderstegen* (2); *Pelly* v. *Wathen* (3). In particular the bank was not entitled to charge thereon any allowances made to *Glass* either before or after the 2nd of June, 1869. A man cannot have possession in two characters, first, as mortgagee, and second, as banker. The one excludes the other. Reference was then made to *Ex parte Trethowan* (4). With regard to the claim of compound interest made on the other side, that is not chargeable under the circumstances of this case.

With regard to the point made upon the other side as to the bank's not being liable for interest on the surplus proceeds retained by it: see *Quarrell* v. *Beckford* (5); and as regards its claim for costs said to have been incurred in defending its securities: see *Parker* v. *Watkins* (6); *Walters* v. *Woodbridge* (7). As to reservation of costs; where an overpayment is alleged it is the practice to reserve the costs until the result of the account directed by the Court is known. *Cotterell* v. *Stratton* (8) was a decision on further consideration.

Mr. *Kay* replied.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

The material facts of this case may be thus stated: In the year 1858 one *Glass* became (if he had not been before) a customer of the Appellants the *London Chartered Bank of Australia*, and entered into an agreement with them on the 3rd of May, 1858, embodied in the following letter to the manager:—"In considera-

(1) 32 Beav. 269.
(2) 2 Drew. 413.
(3) 7 Hare, 351.
(4) 5 Ch. D. 559.
(5) 1 Madd. 269.
(6) Joh. 133.
(7) 7 Ch. D. 504.
(8) Law Rep. 8 Ch. 295.

tion of your from time to time discounting on my request such bills of exchange or promissory notes as I may hand to you for that purpose, and which you may approve, or granting me an advance in the shape of an overdrawn account, I hereby undertake and agree that the bank shall have a lien on all securities that may belong to me, and which may be in the hands of the bank at the time of the discounting for me of any bill or note, or that may come to the hands of the bank during the currency of any bill or note as a security for the due payment at maturity of the same, or for the repayment of any amount I may be overdrawn." He continued to be a customer of the bank from that time up to the year 1868, upon the terms of this note, and considerable transactions took place between them. On the 8th of April, 1868, *Glass* gave the bank the following memorandum, indorsed on the mortgage deed to which it refers: "In consideration of the sum of £40,000 sterling (less discount thereon) this day advanced and paid to me by the *London Chartered Bank of Australia*, the receipt whereof I hereby acknowledge, I hereby transfer the within written mortgage, and all my right, title, and interest therein, and moneys thereby secured, unto the said *London Chartered Bank of Australia*, its successors and assigns. As witness my hand this 8th of April, 1868." This memorandum was subsequently registered on the 29th of May. The mortgage referred to in it was from one *Nash* of an extent of country which may be called the *Clare* run, with a large amount of stock upon it, which *Nash* had mortgaged to *Glass* in consideration of a sum of £63,000 due from *Nash* to him; and *Nash* had at the same time given *Glass* four bills of exchange notes amounting to the sum of £63,000, which at the same time *Glass* deposited with the bank. On the same day *Glass* also gave to the bank this letter addressed to the Chief Commissioner of Crown Lands, *Sidney*: "Sir, I hereby notify to you that I have assigned and transferred to the *London Chartered Bank of Australia* all my right, title, and interest in and to the run of Crown lands situate in the district of *Murrumbidgee*, and known as *Nouranie* or *Nowcranie*, now held by me under promise of lease from the Crown, and I hereby relinquish in favour of the said *London Chartered Bank of Australia* all and any rights or privileges of occupation or of pre-emption which may belong or accrue to me

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as the holder of a promise of lease of the said run under the laws and regulations for the time being. As witness my hand at *Melbourne* this 8th day of April, 1868." The bank upon these securities discounted a promissory note of *Glass's* at four months' date for £40,000, and subsequently, when that note was renewed, they discounted the renewal of it, and they discounted further renewals crediting him with the amount, less discount, and debiting him with the £40,000. It appears that in September, 1868, upon the first renewal of the note, they took from him a further memorandum. It is in these terms: "2nd September, 1868. In consideration of your having discounted at my request my promissory note in favour of the bank for £40,000, say £40,000 sterling, dated the 1st of August, 1868, and payable five months thereafter, I hereby, in security of its due payment or of any renewals thereof, deposit in your hands transfer of license of *Nowcranie* run, in the *Murrumbidgee* district in the colony of *New South Wales*, together with an assignment of a mortgage executed in my favour by *William Nash* over *Clare* blocks, known as *Clare A*, *Clare B*, *Clare C*, *North Clare A*, and *North Clare B* stations, in the *Darling* district in the colony of *New South Wales*, dated the 8th of April, 1868: also license of said stations. And I also undertake, when called upon so to do, to make an assignment to you of the above mortgage with all my interest and powers conferred therein." The next date material to notice is the 22nd of May, 1869, when an assignment of whatever right and interest *Glass* had in the *Nowcranie* run was transferred by him to Messrs *Blackwood & Co.*; and on the 31st of May, 1869, *Glass* executed a second mortgage of the *Clare* run to Messrs. *Andrew Bridges White* and *James White*, the Plaintiffs in this suit. Notice of their second mortgage was given to the bank by the Messrs. *White* on the 3rd of June, 1869, and of theirs by the Messrs. *Blackwood & Co.* on the 27th of July, 1869. Messrs. *White* being desirous that the bank should not exercise their power of sale of the *Clare* run, as it appears they were disposed to do in June, 1869, came to an arrangement with the bank (upon which nothing in this case turns) that half the expense of the run should be divided between them. The bank took possession about the beginning of July, 1869. *Glass* became a bankrupt on the 3rd of December, 1869, and subsequently the bank sold the *Clare* stations

and stock for the sum of £26,692, and its interest in the *Nouranie* station for £15,000, making together a sum above £40,000.

In the year 1876 Messrs. *White* instituted the present suit, in which they stated the facts which have been mentioned, and prayed that accounts and inquiries should be made for the purpose of ascertaining the net proceeds of the *Nouranie* station received by the bank, and for the purpose of ascertaining the net profits and proceeds of the *Clare* stations and stock, and of the sale thereof, received by the said bank after deducting all charges and expenses of the said bank while mortgagee in possession, including all moneys paid by the Plaintiffs; and also "an account of all moneys which became due to the said bank for principal and interest on the security of the indenture of transfer of mortgage of the 8th of April, 1868, in the bill mentioned, such account not to include any principal moneys exceeding £40,000, or any advances which may be claimed to have been made by the said bank subsequently to the 3rd of June, 1869, or interest upon any interest converted into principal; and in calculating interest on the principal moneys due to the said bank, regard being had to the date at which the said principal moneys were in fact paid off by the receipt of the proceeds of sale of the *Nouranie* station and of the *Clare* stations and stock;" and further "that it may be declared that the net proceeds of the *Nouranie* station, and the net proceeds of the *Clare* stations and stocks to be ascertained by the accounts hereinbefore prayed, are to be deemed to have been applied by the said bank rateably in satisfaction of the debt due to the said bank;" and they further prayed for the payment to the Plaintiffs of the balance of the net proceeds of the *Clare* station and stock which remained after such rateable deduction.

The case of the bank, as far as it is material to notice it at present, was chiefly this, that the effect of the letter of 1858, coupled with the transactions in 1868, and indeed all their dealings with *Glass*, had the result of the bank being entitled to treat the above-mentioned securities as applicable to the balance of the general account, and not only to the specific sums which it was contended on the other side they were given to secure.

Their Lordships adopt the law which is thus very shortly and clearly stated by Lord *Campbell* as applicable to questions of

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bankers' lien in the well-known case of *Brandao* v. *Barnett and Others* (1), "Bankers most undoubtedly have a general lien on all securities deposited with them as bankers by a customer, unless there be an express contract or circumstances that shew an implied contract inconsistent with lien."

But though the law is sufficiently clear, its application to the facts of this case involves a question of some nicety, viz., whether the transactions should be treated as governed by the letter of 1858, or by the principle of general lien; or whether the memorandum of 1868 and the subsequent letter of September of that year, did not effect a contract, express or implied, inconsistent with the letter of 1858, or with a general lien. In the view which their Lordships take of the case, it appears to them unnecessary to decide this question.

The case came in the first instance, before Mr. Justice *Molesworth*. The question which has been just referred to was undoubtedly argued before him, and appears to have been decided by him adversely to the bank. Their Lordships observe that in the course of his judgment he uses the following expressions: "The bank's original dealing as creditors was with interest at 8 per cent., and that is the Court rate of interest; so that is the rate which I shall hold it entitled to receive and be charged when overpaid. The bank pass book running to about the 1st of July, 1869, mixes all dealings up to that date. If *Glass* had reduced the debt of £40,000, his second mortgagees would be entitled to the benefit. I have stated that the bank would not be entitled to subsequent advances." (It may be here observed that there is no question but that after the notices received from the bank by the different mortgagees, the one dated the 3rd of June, and the other the 27th of July, 1869, the bank could not make any subsequent advances which would be chargeable as against the mortgagees who had thus given notice). "If *Glass* had reduced the debt of £40,000, his second mortgagees would be entitled to the benefit. I have stated that the bank would not be entitled to subsequent advances; still, a question would remain as to appropriating *Glass's* payments to such advances, or to the interest on the £40,000. I cannot connect the pass-book with the account of

(1) 3 C. B. 531; 12 Cl. & F. 787.

the bank sought to be relied on in this suit. I take it from the pass book that about the £40,000 was due on the mortgage securities of April, 1868, when the bank became mortgagees in possession, July, 1869; that since then it has been paid off by receipts as mortgagees in possession, and by selling the corpus of the two several securities; and that there have not been subsequent direct dealings between it and *Glass* which should be brought into account, and shall frame a decree on that basis subject to such objections as I may hear, refer it to the Master to take an account of the mortgage debt due to the Defendant the *London Chartered Bank of Australia*, taking it as on the 1st of July, 1869, as £40,000, bearing interest at 8 per cent., and of the sums received by the said bank in satisfaction thereof as mortgagees in possession or as sellers of the corpus of the securities, the *Clare* stations in the bill mentioned, and the stock therein, and the *Nouranie* station; . . . and direct that the account be taken with convenient rests, reducing principal, but that no interest on interest be allowed," and the decree is in substance in accordance with the judgment upon this point.

The first ground upon which the banking company appealed from this judgment to the Full Court was this: "That in taking the account of the mortgage debt in the said decree mentioned, the Defendant Bank is entitled to make half-yearly rests, converting interest into principal, and His Honour ought so to have declared in lieu of directing that no interest upon interest should be allowed." The second ground refers to the rate of interest: "That in taking the said account the said bank is entitled to charge interest at the current bank rate on overdrafts, and His Honour ought so to have declared instead of allowing interest at 8 per cent. only."

It appears to their Lordships that if the bank had desired to contest the finding of Mr. Justice *Molesworth* on the subject of the principal sum secured by the mortgages, their grounds of appeal would have been totally different. Their contention would have been that instead of taking the principal sum of £40,000 as that due on the 1st of July—which their Lordships cannot help thinking he does to a certain extent in favour of the bank—their contention would have been that the bank's general account as it

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stood at the time of the insolvency should have been looked into, and that it should have been ascertained how much *Glass* was then indebted to them, no advances subsequent to the reception of notice by them being allowed. Their Lordships are by no means satisfied that if the account had been so taken it would not have been less favourable to the bank than the way in which Mr. Justice *Molesworth* dealt with the debt; but, be that as it may, the bank seem to have, probably for good reasons, acquiesced in his finding of the amount of £40,000 as the principal of the mortgage debt.

Such undoubtedly appears to have been the view of the High Court, for the High Court stated that they were not agreed upon the main question as to whether the bank was or was not entitled to treat the securities as deposited with them in respect only of specific sums or on their general account, but they treat that difference of opinion as immaterial, inasmuch as all they had to do with was the question of interest.

That being so, it appears to their Lordships that the bank must be confined to the grounds which they took before the High Court, and on which the High Court decided, and that the bank having been then satisfied that the mortgage debt should be taken to be the specific sum of £40,000 and not the balance of the general banking account, must be satisfied to take the consequences, namely, that they should be allowed simple interest only upon that amount, as they would be as mortgagees. They also think that the rate of interest to which the bank objected was the proper one.

It remains only to notice the other grounds of appeal. Nothing arises upon the third ground on which the judgment was modified. The fourth ground is, "That the said bank ought not to be charged with interest on the amount of its overpayment or subsequent receipts, or, if charged with any interest thereon, ought not to be so charged for any period prior to the commencement of this suit, or at a higher rate than 4 per cent. per annum." The judgment of Mr. Justice *Molesworth*, which went to the extent of directing that the Master "should fix the time when the bank should be deemed to be overpaid, and compute the sum which the bank should be deemed to be overpaid, charging interest on that

overpayment and all subsequent receipts," the full Court has modified, probably on the ground, which has been properly argued, that the bank were, as it were, between two fires—there were two claimants, and it was very difficult for them to determine what they should pay over and to whom. The decree of the full Court stands thus: "And this Court does further order that the said decree be further varied by striking out so much of the said decree as directs the said Master to charge the said bank with interest on the overpayment to the said bank therein mentioned, and on all subsequent clear receipts, at the rate of 8 per cent. per annum to the making of his report, and in lieu thereof this Court doth direct the said Master to charge the said bank with interest at the rate aforesaid on so much only of the said overpayment as the said bank has heretofore claimed to retain as mortgagee, but to which, upon taking the accounts directed by the said decree, the said bank shall appear not to have been entitled." This, at all events, would confine the chargeability of interest to such sums only as in the opinion of the Master the bank had improperly, or without title, retained, claiming them on their own account, and not merely on account of any difficulty as to who should be entitled to receive them. It appears to their Lordships very difficult to say that this direction is wrong, or that it is not possible that such a case may be made out before the Master, of withholding or delaying payments, as would justify him in acting upon this direction.

It was further argued before their Lordships that the decree was wrong in a comparatively small point which may be thus stated: It seems that Messrs. *Blackwood* had brought an action against the bank in which the Messrs. *Blackwood* claimed to have the first security upon the *Nouranie* run. The bank succeeded in the Courts in the colonies and also in the appeal to Her Majesty, and Mr. Justice *Molesworth* appears to have intimated that they were entitled, as against the Plaintiffs, to their costs as between solicitor and client in the Courts of the Colony, but not before the Privy Council, inasmuch as the Privy Council had directed a specific sum to be paid. There is no ground of appeal applicable to this point, and their Lordships are therefore unable to deal with it; but they may observe that they cannot concur in the distinction

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taken by Mr. Justice *Molesworth* between the two sets of costs. As the decree stands, it may possibly be open to the Master to take the view which is contended for on behalf of the Appellants.

The only remaining question is as to costs. The Judge of the Court below has reserved the costs of the suit. Their Lordships are unable to see that he was wrong in doing so. It may be (though it is impossible to predict this) that the bank in the end may get all their costs. It does not appear to their Lordships that any inflexible rule, such as it has been contended prevails in mere redemption suits, applies here. This is not, strictly speaking, a mere redemption suit, and under the circumstances their Lordships do not think any case has been made out so strong as would induce them to exercise a discretion, which they very seldom do, of interfering with the judgment of the Court below on the question of costs. With respect to the costs in the appeal below, both parties to a certain extent succeeded, and it seems fair to have made each party pay their own costs.

Under these circumstances their Lordships will humbly advise Her Majesty that the judgment of the Court below be affirmed, and that this appeal be dismissed with costs.

Solicitors for the Appellant: *Freshfields & Williams.*
Solicitors for the Respondents the *Whites: Wadeson & Malleson.*

[HOUSE OF LORDS.]

ANNE CHARLTON AND DORA MEYRICK . APPELLANTS;

AND

THE ATTORNEY-GENERAL . . . . . RESPONDENT.

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1879
March 6, 7, 14; *May* 5.

Succession Duty—"Predecessor"—Tenant in Tail—Donor of Power—16 & 17 *Vict. c.* 51.

Where a power is created, to be exercised over an estate, the donor of the power, the person out of whose estate a benefit or "succession" is to be derived, is, within the 2nd section of the *Succession Duties Act*, the "predecessor" of the person taking such benefit or "succession."

St. J., a father, tenant for life of an estate, and his eldest son *William*, tenant in tail, re-settle the estate, the son becoming tenant for life, remainder in tail, reserving to themselves a power of appointment, and, in default, giving the power to appoint to the father and *Thomas*, the second son (who is thereby made tenant for life, remainder in tail). *William* dies unmarried, and without having appointed, and the father and *Thomas* appoint. The persons taking the succession under such appointment, take it as a succession from *William*, the eldest son, the donor of the power, from whose estate the benefit is derived, and not from the father and *Thomas* the second son, who exercise the power.

The cases of *The Attorney-General* v. *Braybrooke* (1), *The Attorney-General* v. *Floyer* (2), and *The Attorney-General* v. *Smythe* (3) followed.

The case does not fall within the first portion of the 4th section of the statute.

Per THE LORD CHANCELLOR (Earl *Cairns*):—The words of the 4th section apply to the case of one person possessing a general power to dispose of property as an absolute owner, and not to a power given in a family settlement to a father and son, where one is intended to be a check upon the other in the exercise of the power.

Per LORD SELBORNE:—The first branch of the 4th section points to an absolute power, practically equivalent to property. A general power in a family settlement, which cannot be exercised without the concurrence of two minds, is not equivalent to a joint property in the two donees.

The case is not to be treated as an alienation within the 15th section of the statute.

IN the beginning of 1820 a settlement of the *Charlton* estates was made, under which Mr. *St. John Charlton* became tenant for life in possession. In 1854 he and his then eldest son, *William*

(1) 9 H. L. C. 150. (2) 9 H. L. C. 477.
(3) 9 H. L. C. 497.

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Charlton, the first tenant in tail male under the settlement, agreed to re-settle the estates. They were at that time subject to certain incumbrances, and to a rent-charge of £800 a year by way of jointure in favour of Mrs. *Anne* (*St. John*) *Charlton*. By a deed of the 22nd of March, 1854, the estates were disentailed, and, subject to the incumbrances and jointure, were limited to such uses as *St. John Charlton* and his son *William* should jointly by deed appoint, and, in default, to the use of *St. John Charlton* for life, remainder to *William Charlton* in tail male, remainder to *St. John Charlton* in fee.

On the next day, the 23rd of March, 1854, an indenture was executed between *St. John Charlton* of the first part, *William Charlton* of the second part, and certain trustees of the third part, whereby *St. John Charlton* and his eldest son *William*, by virtue of their joint power under the disentailing deed, settled the estates, subject, &c., to such uses as they should jointly by deed appoint, and in default that *William Charlton* should, during the joint lives of himself and his father, receive a yearly rent-charge of £800, and, subject thereto, &c., to *St. John Charlton* for life, remainder to *William Charlton* for life, remainder to his first and other sons successively in tail male; in default, remainder to such uses as *St. John Charlton*, and *Thomas Charlton* (*St. John's* second son) after he attained twenty-one, should jointly by deed appoint; in default, to *Thomas* for life, remainder to his first and other sons successively in tail male, with divers remainders over. In 1858 *Thomas* attained twenty-one, and then assumed the name of *Meyrick*, in lieu of his birth name of *Charlton*. *St. John* and his son *William* never exercised the joint power of appointment under the deed of 1854, and *William* died unmarried in 1862, when *Thomas* became entitled to the same life estate to which *William* had been limited under the deed of the 23rd of March, 1854.

On the 16th of February, 1866, an indenture was executed between *St. John Charlton* of the first part, *Thomas Meyrick* of the second part, and trustees of the third part, by which *St. John Charlton* and *Thomas Meyrick*, in exercise of their joint power of appointment under the deed of 23rd of March, 1854, appointed the estates thereby settled, subject to the life estate of *St. John Charlton*, and the existing incumbrances and charges, to such uses

as *St. John Charlton* and *Thomas Meyrick* should jointly appoint, in default, to the use that Mrs. *Anne Charlton*, in case she survived her husband, should receive a rent-charge of £1700 a year for her life, and subject thereto, to the use that *Mary Rhoda Meyrick*, the wife of *Thomas Meyrick*, should, in certain events, receive a yearly rent-charge of £1000, and subject to these rent-charges, and after the decease of *St. John Charlton*, in certain specified events (affecting an estate in tail male of other property given to *Thomas Meyrick* by the will of his grandfather) to the uses following, that is to say, during the before mentioned specified period the *Charlton* estates were to go to the use of *Dora Meyrick* (the daughter of *Thomas Meyrick* and granddaughter of *St. John Charlton*), during so much as she should live of the certain period therein described and defined, and which is still undetermined.

St. John Charlton died on the 23rd of February, 1873. *Thomas Meyrick* was his executor. On *St. John Charlton's* death the provisions for Mrs. *Anne Charlton* and for *Dora Meyrick* came into operation. The Crown claimed succession duty at the rate of £1 per cent. from *Anne Charlton* in respect of her jointure rent-charge of £1700, as a succession derived from *William Charlton*, the donor of the joint power created by the settlement of the 23rd of March, 1854, which was exercised by the deed of the 16th of February, 1866; and also duty at the rate of £3 per cent. on the succession of *Dora Meyrick* to the hereditaments as derived (in the same manner) by her from *William Charlton* her uncle. Mrs. *Anne Charlton*, and *Thomas Meyrick* (as guardian of his daughter), objected to these claims, but offered to pay duty at the rate of £1 per cent. on one moiety of Mrs. *Charlton's* jointure rent-charge of £1700 as being a succession upon the death of *St. John Charlton*, derived from *Thomas Meyrick* as the predecessor, under the re-settlement of February, 1866; and *Thomas Meyrick*, as guardian of *Dora Meyrick*, offered to pay duty at the rate of £1 per cent. as succession duty on the estates comprised in the re-settlement of February, 1866, as being a succession upon the death of *St. John Charlton*, derived by her from him and *Thomas Meyrick*, as joint predecessors under that re-settlement.

An information filed by the Attorney-General on the 19th of March, 1875, prayed a declaration that the Appellants were liable

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to pay the duties claimed, as above-stated, or that, if the Court should be of opinion that the joint power created by the deed of the 23rd of March, 1854, and exercised in 1866 by *St. John Charlton* and *Thomas Meyrick*, was a general power of appointment within the meaning of the 4th section of the *Succession Duty Act*, 1853, then, that having exercised that power they ought, under the 3rd and 4th sections of the Act to be deemed to have been entitled, at the time of their so exercising it, to the property as a succession derived by them from *William Charlton*, and that duty thereon attached at the rate of £1 per cent. on the moiety of *St. John Charlton*, and at the rate of £3 per cent. on the moiety of *Thomas Meyrick*, and that in such case it might be declared that Mrs. *Anne Charlton* was liable to pay succession duty at the rate of £1 in respect of one moiety of the rent-charge of £1700, and that *Dora Meyrick* was liable to pay succession duty at the rate of £1 per cent. in respect of her succession to the estates comprised in the settlement of February, 1866.

Thomas Meyrick denied that *St. John Charlton* and himself took under the deed of the 23rd of March, 1854, as a succession to *William Charlton*, and the other Appellants contended in substance that the successions as to the rent-charge of £1700, and as to the life estate of *Dora*, were to be treated as derived from *St. John Charlton* and *Thomas Meyrick* alone.

The Appellants having put in an answer to the information the case came on to be heard before the Exchequer Division, and by a decree dated the 29th of February, 1876, it was declared that *St. John Charlton* and *Thomas Meyrick* were, under the 2nd section of the Act, the predecessors from whom Mrs. *Anne Charlton* and *Dora Meyrick* derived their respective interests under the settlement of February, 1866, and it was ordered that Mrs. *Anne Charlton* should pay duty at the rate of £1 per cent. on one moiety of the jointure rent-charge of £1700, and that *Dora Meyrick* should pay duty at the rate of £1 per cent. on her determinable estate in the hereditaments, as derived from her grandfather and father respectively. These payments having been previously offered to be made, costs were given to Mrs. *Charlton* and Miss *Meyrick* (1). On appeal by the Attorney-General, this decree was, on the 30th

(1) 1 Ex. D. 204.

of June, 1877, ordered to be reversed, and it was declared that Mrs. *Anne Charlton* and *Dora Meyrick* took as successors from *William Charlton*, the donor of the joint power created by the settlement of the 23rd of March, 1854, which power was exercised in February, 1866. And it was declared that succession duty at the rate of £1 per cent. was payable on the value of the life of Mrs. *Anne Charlton* at the time of the death of *St. John Charlton*, on so much of the jointure rent-charge of £1700 under the settlement of February, 1866, as was comprised in the settlement of August, 1820; and that succession duty at the rate of £3 per cent. was payable on the life estate of *Dora Meyrick* at the time of the death of *St. John Charlton*, on so much of the real estates comprised in the settlement of February, 1866, as was comprised in the said settlement of August, 1820, and £1 per cent. on the the residue of the real estate (1). Lord Justice *Bramwell* had thought that the 4th section of the statute, which expressly applied to gifts under powers, ought to govern this case, but the other Lords Justices held that, under the authority of previous cases, the gift fell within the operation of the 2nd section.

This appeal was then brought.

Mr. *H. Fox Bristowe*, Q.C., and Mr. *G. S. Law* (Mr. *Spencer P. Butler* was with them), for the Appellants:—

The substantive question in this case is, from whom these ladies derived their respective successions. The Crown contends that on the 22nd of March, 1854, *William Charlton*, being then tenant in tail of the *Charlton* estates, and creating the power which was afterwards exercised by his father and brother, the duty attaching on the benefits given under that power must be chargeable as on a succession derived from him, and not derived from *St. John Charlton* and *Thomas Meyrick*, who were the mere donees of the power under the resettlement. The Appellants contend that the power was a general power of appointment, and that they derived their successions under it from *St. John Charlton* and from *Thomas Meyrick*, and from them alone. In cases of appointments under powers, the distinction between a general power and a limited power of appointment ought to be re-

(1) 2 Ex. D. 398.

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membered. "By a general power we understand a right to appoint to whosoever the donee pleases. By a particular power it is meant that the donee is restricted to some objects designated in the deed creating the power": *Sugden* on Powers (1). And this is especially the case with a family settlement, and the section has really adopted the statement that the possessor of a general power is like the owner in fee of the estate. The person who becomes his appointee is therefore his "successor" within the proper meaning of the words of the statute, and the person making the appointment under a general power is the "predecessor." Here Mr. *Meyrick* was possessed of this general and unrestricted power of appointment, and used it in favour of his own daughter. He therefore was the predecessor, and she took under his appointment, and consequently was liable only to a duty of £1 per cent. Or, taking *St. John Charlton* to be a joint predecessor with him, she then took under the appointment of her father and grandfather, and was only liable to the same duty—namely £1 per cent. And in the same way Mrs. *Anne Charlton* took one half of her rent-charge from her husband and the other half from her son. In determining this case, the Court of Appeal has not given to the 4th section of the Act the importance which it deserves. The 2nd section has been treated as governing the case, and it has been held that the persons benefited had taken, not from the donees, but from the donor of the power. But where, as here, the facts bring the case within the words of the 4th section, that section ought to be applied in imposing the duty. Such was the opinion of Lord Justice *Bramwell* in this case, and the words of the 4th section clearly require that construction. If not applied to a case like the present, it is difficult to see to what state of circumstances they can be applicable. The words of the 4th section relate, in terms, which the words of the 2nd section do not, to general powers and appointments under them, and declare that the person possessing and exercising a general power of appointment which is to take effect upon the death of another, is to be deemed the owner of the property which is the subject of the appointment. He has over it a complete control. If after that he disposes of it in any way, he becomes the

(1) 8th Ed. c. 8, s. 1, sub-s. 4, p. 394.

predecessor, and the person in whose favour he disposes of it is the successor to him but not to any other person, for the property is in him, he is the absolute owner of it, and his disposition of it is that alone which is to be regarded. That was really the condition of *Thomas*, who was to be looked on in the light of a purchaser of the property, and that was the principle acted upon in the case of *Attorney-General* v. *Upton* (1), upon which case the Appellants are entitled to rely.

The *Succession Duty Act* is an Act for granting money to the Crown and imposing a tax; it must, therefore, be construed strictly. So construed, and giving the words used their natural and proper meaning, it is plain that the real possessors of the estate at the time the appointments were made, were *St. John Charlton* and his son, *Thomas Meyrick*, and it would be quite absurd, as was pointed out in the judgment in the Court of Exchequer (2), to go back from those who were actually in possession of the property to seek for some one in whom the title to it had been originally vested. The title of *William Charlton* had passed away, that of *St. John Charlton* and of *Thomas Meyrick* was in full existence, they were the real joint predecessors of the Appellants, and under their title, and under no other, was the appointment in favour of *Anne Charlton* and *Dora Meyrick* made. The Appellants do not take by way of alienation from *William Charlton* within the meaning of the 15th section of the Act, but if they did, they would only be liable to pay the same rate to which he would have been liable had he succeeded, namely, £1 per cent., or they would take as alienees of a succession acquired by *St. John Charlton* and *Thomas Meyrick* within the 4th section of the *Succession Duty Act*, and would then be liable to pay the same duty as those persons must have paid if they had become entitled in possession to these estates, namely, £1 per cent. on one moiety, and £3 per cent. on the other moiety of the property.

The cases in the House of Lords on this subject do not apply here. In *Lord Braybrooke* v. *The Attorney-General* (3) the real question was whether a person, being liable as a successor under a will, could alter his liability by making a different disposition of the

(1) Law Rep. 1 Ex. 224. (2) 1 Ex. D. p. 211.
(3) 9 H. L. C. 150.

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property in his own favour, and it was held that he could not. He was there the donor and the donee of the power under which the re-settlement was made, and so the only question really decided was as to his power to alter his own liability by changing the nature of the estate he gave himself. So in *The Attorney-General* v. *Floyer* (1), *W. J.* was at once the donor of the power and the possessor of the estate, and *E. G.* took it direct from him, and having taken it, made a re-settlement of it in his own favour, and it was held that he could not by any act of his own alter his condition with respect to the duty chargeable upon him as the successor to *W. J.* In *The Attorney-General* v. *Smythe* (2) there could be no doubt that *C. F.*, the last person named in the settlement made by his elder brother *E.*, took direct from that elder brother, and was therefore liable to the duty of £3 per cent. But those cases did not affect the present, for here, under a general power of appointment given to two persons, father and son, the father and son had made the appointments to the wife of the one and the daughter of the other, the wife and daughter taking directly from these two persons who were in possession of the estate, and who, being so, must be considered their predecessors. The appointment ought to be referred to both, for it was in terms a joint power of appointment, and though the 4th section of the statute used the word "person" in the singular number, that word was capable of being construed as a word in the plural under the provisions of *Lord Brougham's Act* (13 & 14 Vict. c. 21). [EARL CAIRNS, L.C.:—Father tenant for life, eldest son tenant in tail, agree to bar the entail, and limit the estate to uses such as they shall jointly appoint. A person who takes a beneficial interest under their appointment surely takes it not from both, but from the estate of the owner of the estate tail, that is, from the son.] But by the deed of the 23rd of March, 1854, the estate became the property of *St. John Charlton* and his son *Thomas Meyrick*, and there is a substantial distinction between the case of a man creating a power over his own estate, and then using that power in his own favour, and the case of a man receiving the power with the estate, and using it in favour of a third person. The person in whose favour it is used must be the successor of the person in whom

(1) 9 H. L. C. 477. (2) 9 H. L. C. p. 497.

the estate had vested, and who had conferred it on him. It is the person who "makes the settlement," that is, the predecessor.

If this appointment is to be treated as a transfer of interest or an alienation, under the 15th section, the duty payable would be that "at the same rate as the person originally entitled would have been chargeable with if no such alienation had been made or derivative title created."

Lovelace's Case (1); *Lilford* v. *The Attorney-General* (2); *Collingwood* v. *Stanhope* (3); *Lord Eustace Cecil's Case* (4); *Ramsay's Case* (5); *Barker's Case* (6); *Fryer* v. *Morland* (7); *Chapman's Trusts* (8); *Cooper* v. *Harlech* (9); *The Attorney-General* v. *Littledale* (10); and *Drake* v. *The Attorney-General* (11), were cited and commented on.

The Attorney-General (Sir *J. Holker*) and Mr. *W. W. Karslake*, for the Crown:—

There is no real difficulty in this case. It cannot be distinguished in principle from the cases of *Braybrooke* (12), *Floyer* (13), and *Smythe* (14). It makes no difference whether the donor of the power having made himself the donee of the power exercises it in his own favour or in favour of another person. The question is from whose estate the benefit is derived. It is plainly derived from the estate of the tenant in tail; the tenant for life had nothing to give, or at all events gave nothing. In the Court below the sale of an estate was referred to. It is clear that in such a case the estate itself, in the hands of the person beneficially entitled to it, would be liable to duty; the person who became possessed of it by purchase would not be liable to duty in respect of his purchase: *Dugdale* v. *Meadows* (15). The principle of liability would come into operation again when the purchaser, being

(1) 4 De G. & J. 340; 28 L. J. (Ch.) 489.
(2) Law Rep. 2 H. L. 63.
(3) Law Rep. 4 H. L. 43.
(4) Law Rep. 5 Ex. 263.
(5) 30 Beav. 75.
(6) 7 H. & N. 129.
(7) 3 Ch. D. 675.
(8) 2 H. & M. 447.
(9) 4 Ch. D. 802.
(10) Law Rep. 5 Ex. 275; 5 H. L. 290.
(11) 10 Cl. & F. 257.
(12) 9 H. L. C. 150.
(13) Ibid. 477.
(14) Ibid. 497.
(15) Law Rep. 6 Ch. Ap. 501.

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then the beneficial holder of the estate, gave it to another person. On that person succeeding to the gift he would be liable to the duty. The gift by, or by the authority of, the person really possessed of the estate, created a succession; that person, *William Charlton*, was the real predecessor, and the successor was the person who took it under his gift.

The Attorney-General v. *Upton* (1) was decided on the construction of the 4th section, but this case plainly falls within the 2nd section of the statute.

The Attorney-General v. *Gell* (2); *The Commissioners of Inland Revenue* v. *Harrison* (3); and *The Solicitor-General* v. *The Law Reversionary Society* (4) were referred to.

Mr. *H. F. Bristowe* replied.

THE LORD CHANCELLOR (Earl *Cairns*):—

My Lords, the property which is subject to succession duty in this case was disentailed and re-settled by deeds of the 22nd and 23rd of March, 1854, which both sides have taken in their argument as the commencement of the title. At that time *St. John Chiverton Charlton* (whom I will call *St. John Charlton*), was tenant for life of the property, and his eldest son, *St. John William Charlton* (whom I will call *William*), was the first tenant in tail male. By the deed of the 22nd of March, 1854, the property was settled to such uses as *St. John Charlton* and *William Charlton* should appoint; in default to *St. John* for life; with remainder to *William* in tail male, with remainder to *St. John* in fee.

By the deed of the 23rd of March, 1854, a settlement was made under the joint power of *St. John* and *William* to such uses as *St. John* and *William* should appoint; in default to secure an annuity of £800 to *William*, during the joint lives of himself and *St. John*; remainder to *St. John* for life; remainder to *William* for life; remainder to *William's* first and other sons in tail male; remainder to such uses as *St. John* and *Thomas*, his second son, should appoint; remainder to *Thomas* for life; remainder to his first and other sons in tail male.

(1) Law Rep. 1 Ex. 224.
(2) 3 H. & C. 615.
(3) Law Rep. 7 H. L. 1.
(4) Law Rep. 8 Ex. 233.

By a re-settlement of the 16th of February, 1866, at which time *William* was dead without issue, *St. John* and *Thomas* re-settled the estate, subject to the life interest of *St. John*, to such uses as *St. John* and *Thomas* should appoint; remainder to secure a rent-charge of £1700 to the Appellant *Ann*, the wife of *St. John*, for her life, and, subject thereto, to the Appellant *Dora Meyrick* for certain interests therein specified.

St. John, the tenant for life, died in 1873, and thereupon the succession to the Appellants opened; and the question is, from whom do they take the succession, and what is the rate of duty payable? The Court of Appeal has held that they derive their succession from *William Charlton* the tenant in tail, the son of the one Appellant and the uncle of the other, and it is the correctness of this decision which is now in question.

If this question is to be decided by the 2nd section of the *Succession Duty Act*, I do not think the answer to it can admit of any doubt either on principle or authority. The 2nd section, reading it shortly, enacts that every disposition of property by reason whereof any person shall become beneficially entitled to any property on the death of any person, shall be deemed to confer on the person entitled by reason of such disposition, a succession; and the term "successor" shall denote the person so entitled, and the term "predecessor" shall denote the settlor or other person from whom the interest of the successor is derived.

The Appellants undoubtedly became beneficially entitled to property upon the death of *St. John Charlton*, and they became so entitled by reason of a disposition of the property. What was the disposition of the property? I cannot doubt that it was that contained in the three deeds which I have already mentioned, the 22nd and 23rd of March, 1854, and the 16th of February, 1866. It was the first two of these which created the power in *St. John* and *Thomas*, and it was the third which exercised the power. Nor should I doubt that, in this disposition, *William Charlton* was the settlor. *St. John Charlton* had throughout nothing but an estate for life, and the first estate of inheritance was in *William*; and it was out of that estate of inheritance and out of the fee into which it was expanded that the interests given to the Appellants came. But I look upon this construction of the 2nd section, as to cases

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coming within it, as completely and finally settled by the cases in this House, reported in 9th House of Lords Cases, and especially by the cases of *Braybrooke* (1) and *Floyer* (2), and as no longer open to controversy.

The contest, however, of the Appellants at your Lordships' Bar was not so much founded on the 2nd section, as it was directed to shew that it was the 4th and not the 2nd section of the Act which applied to the present case, and I observe that in the Court of Appeal much difficulty was felt by some of the learned Judges with reference to the 4th section. Lord Justice *Bramwell* thought that the present case was within the very words of the 4th section. The Lord Chief Justice thought that the present case, and also the cases in this House which I have already referred to, all came within the 4th section; but he considered he was bound by the authority of the decisions referred to, however fatally wrong, as he said, he might deem them to be. Lord Justice *Brett* said that if the present case is to be treated as coming under sect. 2, then he could see no case to which sect. 4 could apply.

My Lords, there is no doubt that the cases in this House, especially those of *Floyer* (2) and *Smythe* (3), did determine, not only that the construction of the 2nd section was such as I have mentioned, but also that it was the 2nd and not the 4th section which governed such cases. And I agree with what is said by Lord Justice *James*, that the only distinction suggested is, that in those cases the donors of the power were the same as the donees of the power, that is, the tenant for life and the eldest son; and that in the present case the donees are the tenant for life and the second son, and that this creates "no more difference in law than the fact that the names are different does."

But, my Lords, the argument that the 4th section of the statute is applicable to a case like the present, appears to me to be founded on a misconception of the meaning of that section. In the first place, I must observe that the words "where any person shall have a general power of appointment over property he shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power,

(1) 9 H. L. C. 150. (2) 9 H. L. C. 477.
(3) 9 H. L. C. 497.

to the property or interest thereby appointed, as a succession derived from the donor of the power," appear to me to point to a general power possessed by one person enabling him to dispose of property as an absolute owner, and not to a power given in a family settlement to a father and son where one is intended to be a check upon the other in the exercise of the power. It is true, as was observed in the argument, that words in the singular may be construed as if they were plural, but you must not turn one member of a sentence into the plural and leave the other in the singular. The argument of the Appellant requires that you should construe the section thus, "where two persons shall have one general power of appointment," &c. But this would be absurd, for it would make both the donees of the power, in the event of an exercise of it, take a succession and be liable to pay duty for it, although the name of one might, as I have already said, have been inserted merely as a check, and without the idea of any beneficial interest.

The fact is the 4th section appears to have been inserted, although it is not necessary in the present case absolutely to decide its effect, for the purpose of meeting a case that might well occur, and which but for the 4th section would have been left uncovered. Property might be given after a life interest to various persons in succession, but subject to an absolute and general power in *A. B.* to dispose of the property as he pleased, or to a limited power in *A. B.* to dispose of the property amongst certain objects of the power. The power might not up to, or at the time of the opening of the succession, have been exercised, and it might for some time remain uncertain whether it would ever be exercised. If there was no enactment but the 2nd section, the succession would have to be determined upon the death, and there would, *in hoc statu*, be no means of dealing with the succession except as a succession in those taking in default of appointment. It is here that the 4th section appears to come into operation. It keeps open the question of a subsequent exercise of the power, and as soon as the power, if a general power, is exercised it fixes the person exercising the power with the consequences of a succession as if the absolute property had come to him, and if it is a limited power, and is exercised, it fixes those who take

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under it, as if they had derived a succession from the person creating the power.

So far, therefore, as regards the construction of the 2nd and 4th sections of the Act, it appears to me that the case of the Appellants must fail.

A farther argument was addressed to your Lordships which does not appear to have been used in the Courts below, viz., that there was here a transfer of interest within the meaning of the 15th section of the *Succession Duty Act*. My Lords, as to this it is sufficient for me to say that the case appears to me to be covered by the decision in the *Attorney-General* v. *Cecil* (1), the grounds of which seem to me to be satisfactory, and to be fatal to the argument of the Appellants.

I therefore propose to move that the appeal in this case be dismissed with costs.

LORD HATHERLEY :—

My Lords, I heard the argument on this case, and I have had an opportunity of considering it since, but I have in substance nothing to add to what has fallen from my noble and learned friend on the woolsack, in whose opinion upon the case I entirely concur. It has been pointed out to me by my noble and learned friend on my left, that amongst the numerous cases which have been brought before the Courts upon the *Succession Duty Act*, the two sections which have been chiefly referred to in this case, namely the second and the fourth sections, seem to have been completely covered by a series of decisions. The 2nd section has been open to question upon the two branches which it contains, for there are two branches contained in that section, as there are in the 4th. The first branch of it deals with the case of disposition; the second branch of it deals with the case of devolution. The question as to how far the origin of a title should be attributed to devolution, and as to how far it should be attributed to disposition, was fully considered in this House in *Lord Saltoun's Case* (2), and again at a very recent period, in the case of *Lord Zetland* v. *The Lord Advocate* (3). In that case there was a sort

(1) Law Rep. 5 Ex. 263. (2) 3 Macq. Sc. Ap. C. 659.
(3) 3 App. Cas. 505.

of conjoint action; a disposition created the whole interest, and in that interest as created by the disposition a series of successions, if I may so term them, occurred by descent or otherwise, arising out of the original disposition. The question was whether you were to consider the devolution, which had taken place in the course of pursuing the disposition which had been made, as forming a devolution in every sense, so that the interest of the successor was to be calculated upon that ground, or whether you were to consider it a case of disposition within the 2nd section of the Act.

Now, my Lords, the present case is a case in which we have to determine whether or not the disposition is to fall within the 2nd, or within the 4th section of the Act only. The only difficulty arising upon that is this. As my noble and learned friend has just observed, there could be no doubt in anybody's mind that if you did not find the 4th section there at all, this would be a disposition, and a disposition under the 2nd section of the Act. It is a series of family settlements, the one following the other according to the usual course of conveyancing, by which the father and the son, when the son has become tenant in tail in possession, create an interest by which they take a joint power, limiting back the interest of the father usually for life, and also sometimes curtailing the son's interest (that may or may not be), but giving a joint power to the two. In regard to dispositions, there seems to have been in the minds of the framers of this Act a notion that it would be necessary to include certain other cases which they do not consider sufficiently included in the 2nd section of the Act. That is the only way in which we can account for the 4th section at all. Then the question would naturally arise whether that which is done by an exercise of the power being in every sense of the word a disposition, should fall within the 2nd section of the Act, or within the 4th, having a peculiar construction given to it in the case of such a disposition as we have before us. Like my noble and learned friend, I take the disposition here to be a disposition contained in the series of settlements which we find in the three deeds to which he has referred, under which there was first of all a joint power in *St. John Charlton* and *William Charlton*, the estate tail being in *William*, the eldest son, and afterwards,

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upon that limitation failing, there was a joint power of appointment by the father and by *Thomas*, the second son, and limitations over in default of appointment. Now, whatever difficulties might have surrounded this case (and I confess there are difficulties which at first sight are somewhat calculated to embarrass those who have to give an opinion upon the exact construction of the Act), as regards the first portion, namely, whether or not this case falls within the 2nd section or the 4th section, appear to me to be covered by the authorities which have been mentioned, that is to say, the three cases in this House, all of which are reported in the same volume of the House of Lords Cases, namely, *Lord Braybrooke's Case* (1), *Floyer's Case* (2), and *Smythe's Case* (3). As has been observed, I think, by my noble and learned friend on the woolsack, and as will be observed also by my noble and learned friend who will presently address the House, and whose opinion I have had an opportunity of perusing, no doubt *Floyer's Case* (2) was not overlooked in the decision of subsequent cases. It is referred to in those decisions, and the case seems to have been altogether well considered. If that case be law, which we must hold it to be as being a decision of this House, then I apprehend the matter is settled—this case falls within the 2nd section, and consequently, according to *Floyer's Case* (2) especially, does not fall within the 4th.

My noble and learned friend on the woolsack has given his view of the reasons which may have induced the Legislature to frame those two sections, in order to meet certain cases which might not otherwise have been provided for at all, either by the 2nd or by any other section of the Act. I think there is sufficient ground for saying that we are not, on account of any supposed inutility of the 4th section (unless the construction be given which is contended for by the Appellants), driven to the necessity of giving it that construction, but that we are in a position in which we can without embarrassment uphold, as one would undoubtedly wish to do, the doctrine which has once been established by this House, and I confess I for one should feel it scarcely competent in us to reverse that doctrine, which is so established, not only by one,

(1) 9 H. L. C. 150. (2) 9 H. L. C. 477.
(3) 9 H. L. C. 497.

but by two or three cases. It appears to me that if there had been such a difficulty as is suggested with reference to the 4th section, the only mode of curing it would have been by a subsequent application to the Legislature. I do not think, however, that any such difficulty arises. It seems to me, for the reasons which have already been urged, and which I will not repeat to your Lordships, that there is good ground for the existence of that 4th section, but that we are not driven to the necessity of applying it to this case. I am content to rest upon the three decisions which have well established that this is a case to which the 2nd section is applicable. The consequence is that the Appellants cannot succeed.

LORD SELBORNE:—

My Lords, in the case of *Lord Braybrooke* (1), where the succession was taken under a joint appointment by father and son, the Lords who concurred in the judgment of this House (Lord *Campbell* and Lord *Kingsdown*) proceeded upon the principle that the appointment was to be read into the deed creating the power, according to the general rule of law applicable to the execution of powers. Lord *Cranworth* was of the same opinion in the two cases of *Floyer* (2) and of *Smythe* (3)—in *Floyer's Case*, not only as to the succession of *George Bankes*, but also as to those of his eldest son and his younger children; and Baron *Martin* was of the same opinion in *Lord Eustace Cecil's Case* (4). It is true that in *Floyer's* and *Smythe's* cases Lord *Wensleydale*, and in that of Lord *Eustace Cecil* the Lord Chief Baron, appear to have founded their judgments on a different principle, which Lord *Wensleydale* (erroneously, I think), considered to have been the principle adopted in *Lord Braybrooke's Case* (1), viz., that the interests of the appointees, under the joint power, were carved out of the new estate (being in all these cases, except one, an estate tail), which the eldest son took under the resettlement; and that the disposition to be looked to was that of executing, not that creating, the power. The single case in which that new estate was not an

(1) 9 H. L. C. 150.
(2) Ibid. 477.
(3) 9 H. L. C. 497.
(4) Law Rep. 5 Ex. 263.

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estate tail was Lord *Braybrooke's;* but there the son had (subject to the joint power) a sole and absolute power of appointment by deed or will, which Lord *Wensleydale* may perhaps have considered equivalent to the inheritance.

Unless a distinction can be founded upon the 4th section of the *Succession Duty Act,* these cases must govern the present. But the result to which they would lead may possibly admit of some question, on account of the differences already mentioned between the views of the Judges, in and out of this House, who decided all but one of them.

In all these cases the same person who was first tenant in tail (or what was deemed equivalent to it) under the resettlement had also been first tenant in tail under the old settlement, so that it practically made no difference whether the successions were under the deed executing, or under that creating, the power. In either view they were "carved" or "derived" out of the estate (whether new or old) of that person, who was one of the two joint donees of the power. But in the present case it is otherwise. Here neither of the donees of the joint power had, either before or after the re-settlement, an estate of inheritance or anything equivalent to it. The father, both before and afterwards, was first tenant for life, and retained that estate throughout, unaffected by the exercise of the power. The life estate of the son and the subsequent remainders were displaced by the exercise of the power, all which had been derived, under the re-settlement, from the prior estate tail of the elder brother, by his disposition.

It may be that, in a case in which one of the appointors has an estate, to be displaced by the appointment, commensurate with, or greater than, the interests appointed, the view of Lord *Wensleydale* and the Lord Chief Baron may be valid in law, as it would certainly be reasonable and convenient. But to such a case as the present it seems to be incapable of being applied. It is impossible to describe the interests of the present Appellants as in any true sense "carved" or "derived" out of the life estate of *Thomas Meyrick,* because they would equally have taken effect by virtue of the joint appointment, though *Thomas Meyrick* had died before his father; and in the event, which has actually happened, of his surviving his father, they may endure after his death. No rule is

laid down in the Act for such a case, unless it be that found in the 4th section; and in the absence of any such rule, it seems necessary to fall back, as was done by this House in Lord *Braybrooke's Case*, and by Lord *Cranworth* (1) and by Baron *Martin* (2) in the subsequent cases, upon the general principle of law applicable to the execution of powers. Unless, therefore, the present case can be brought within the first part of the 4th section, the Appellants fail.

But the later authorities are also really decisive against the application of the first branch of the 4th section to this case. I will assume that Lord Justice *Turner* (3) was right (though the proposition may well admit of doubt) when, connecting the words "taking effect" in the 4th section with a "general power of appointment" as their proper antecedent, he said: "Looking at the context, the words of the section refer to the power coming into operation, and not to the appointment under it taking effect." A power must be held to come into operation either when it is actually executed, or when it is first capable of being executed. If, then, a joint power, such as that in the present case, were "general," and within the first branch of the 4th section, there would have been no possibility of escape from the conclusion that the successions of *Edmund George Bankes* and his younger brothers and sisters (in *Floyer's Case*), and of Lord *Eustace Cecil*, were governed by that enactment; because in both those cases the joint power was created, became exerciseable, and was exercised after the time appointed for the commencement of the *Succession Duty Act*. But the decisions of this House, and of the Court of Exchequer, in these two cases (and for this purpose it is immaterial whether the view of Lord *Cranworth* and Baron *Martin*, or that of Lord *Wensleydale* and the Lord Chief Baron was right) are absolutely irreconcileable with that conclusion.

In the judgment of Lord *Cranworth* upon that part of *Floyer's Case* which related to the portions of *George Bankes's* younger children, the 4th section of the Act was not lost sight of. He said (4): "The circumstance of their arising under a power can

(1) 9 H. L. C. 150.
(2) Law Rep. 5 Ex. 263.
(3) In *Lovelace's Case*, 4 De G. & J. at p. 351; 28 L. J. (Ch.) at p. 497.
(4) 9 H. L. C. at p. 491.

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make no difference. Indeed, this seems to be expressly provided for by the 4th section of the Act. The interest created by the power must, on well-known principles, be treated as arising under the deed creating the power." Lord *Cranworth*, therefore, seems to have considered a joint power of this kind as falling under the second, and not under the first, branch of the 4th section, the effect of which is the same as if it had been left under the second section.

It is true that the distinction between general and limited powers in the common language of English law relates, not to conditions affecting the donees of a power, or otherwise antecedent to an appointment, but to the nature of the appointment which may be made under the power; and for that reason, if the present case had been untouched by authority, I might have felt embarrassed by the use of that phraseology in the 4th section of this Act. I do not think that any stress can safely be laid upon the mere use of the word "person" in the singular number; and I cannot at present adopt the view that the whole section has reference to some rare and peculiar description of cases in which the power is only exerciseable, or has been exercised, after a death, on which an appointment may take effect, has actually happened.

If, however, the substance of the first branch of the section is regarded, it certainly points to that kind of absolute power which is practically equivalent to property, and which may reasonably be treated as property, for the purpose of taxation. That is the case with a general power exerciseable by a single person in any way which he may think fit. But it is not the case when a power cannot be exercised without the concurrence of two minds; the one donee having, and the other not having, an interest to be displaced by its exercise. Nothing could well be conceived more unreasonable, in a practical point of view, than to treat a joint power like that now in question, in a family settlement, as equivalent in substance to joint property in the two donees; and I am convinced that the decisions which have refused to give that effect to the 4th section are in accordance with the true intention of the Legislature, whatever difficulty there may be in the words "general" and "limited" as they there occur.

I have referred as to this point to the later authorities only, because in the earlier cases (those of *Sibthorp* (1), Lord *Braybrooke* (2), *Bankes'* Succession in *Floyer's Case* (3), and *Smythe* (4), the powers "took effect," according to Lord Justice *Turner's* view of the meaning of those words in the 4th section, before the time appointed for the commencement of the *Succession Duty Act;* and, therefore, could not be within the first branch of it. If that view is not correct, and if it ought rather to be held that a power "takes effect" when an appointment made under it becomes effective by coming into possession, the earlier as well as the later authorities would be equally adverse to the Appellant.

I think, for these reasons, that the judgment appealed from ought to be affirmed.

Judgment appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 5th May, 1879.

Solicitors for Appellant: *Law, Hussey, & Hulbert.*
Solicitors for Respondent: *Solicitor of Inland Revenue.*

(1) 3 H. & N. 424.
(2) 9 H. L. C. 150.
(3) 9 H. L. C. 477.
(4) Ibid. 497.

[HOUSE OF LORDS.]

H. L. (E.) 1879 May 15.

SARAH SMITH MORTIMORE . . . . . APPELLANT;

AND

HARRIET ANNE MORTIMORE . . . . RESPONDENT.

Will—Time for ascertaining "Next of Kin" under the Statute of Distributions.

19 Ch D 446

A testator, who had four daughters, divided a fund into four equal amounts, giving one to each daughter and her children; but when one died and left no child the interest was to be paid to the others, and after the death of the last survivor the fund was to be divided among her children; "or if there be no such children, that the same be paid to such person or persons as will then be entitled to receive the same as my next of kin under the statute for the distribution of intestates' estates." One of the daughters left issue, the others had no issue. On the death of the last daughter:—

Held, that under the words of the will the class of "next of kin" described the persons who filled that character at the time of the death of the testator, and not at the death of the last surviving daughter; and that the shares of the daughters who had died without issue were divisible among the persons representing the four daughters.

Bullock v. *Downes* (1) followed.

JOHN CLARKE, by his will, dated the 11th of May, 1825, bequeathed to trustees £12,000 in Consols, in trust, as to £3000 part thereof, to pay the income to his daughter, *Sarah G. Clarke*, for life for her sole and separate use, and, if she should marry and have issue, to her children after her decease: if but one child, then to such only child. "And in case my said daughter *Sarah G. Clarke* shall die without leaving issue her surviving, then I will and direct that the interest and dividends of the said sum of £3000 Consols be paid and divided to, and among, such of my said other daughters as shall then be living, and to the survivor or survivors whether single or married, but to and for their sole and separate use and benefit. And from and immediately after the decease of my last surviving daughter, that the said sum of £3000 Consols be paid and divided to and among the child or children of any such last surviving daughter; and if there shall be no such children, that the sum be paid to such person or persons as will

(1) 9 H. L. C. 1.

then be entitled to receive the same as my next of kin under the statute for the distribution of intestates' estates."

The testator had three other daughters, *Rebecca*, *Mary*, and *Frances*, and trusts in the same words were created with respect to each of them and their children, with the same limitation over in default of children of such daughters respectively. His residuary estate, subject as to £1000 to a power of appointment given to his wife, was directed to be held by the trustees on the same trusts as the £12,000 Consols.

The testator died in 1838, leaving all his daughters him surviving. They were his sole next of kin.

Rebecca married *Charles Cunningham Young*, and died in 1839, leaving, as her only surviving child, a son, *Thomas Young*.

Sarah died in 1851, unmarried.

Mary died in 1872, having been married but leaving no child.

Frances died in 1875, unmarried.

On the death of *Frances* the question arose whether the persons entitled to the three legacies as "next of kin" were those who were next of kin to the testator at the time of his death, or next of kin at the time of the death of *Frances*, the last surviving daughter.

The Appellant was the sole legal personal representative of *Thomas Young*, who had survived *Frances*, the last of the daughters, and she claimed as being, upon the death of *Frances*, the sole next of kin of the testator.

The Respondent was the sole legal personal representative of *Frances*, and, as such, claimed as the next of kin of the testator at the time of his death, and brought an action in the Chancery Division to have the rights of the parties ascertained and declared.

On the 29th of May, 1877, Vice-Chancellor *Bacon* made a decree declaring *Thomas Young* entitled to the trust funds as the sole next of kin of the testator living at the death of *Frances*, on whose death the Vice-Chancellor was of opinion the character of "next of kin," within the words of the will, was to be determined. On appeal this decree was on the 8th of December, 1877, reversed, and it was declared that the persons who, on the death of *Frances*, were entitled to the trust fund, were the next of kin of the testator at the time of his death (1).

(1) *nom. Mortimer* v. *Slater*, 7 Ch. D. 322.

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Mr. *Everitt*, for the Appellant:—

Wills must be construed according to the plain intention of the testator. The intention here was to provide for several contingencies, but at the end of them all, to give the property to the persons who should, when those contingencies came to an end, be the next of the kin of the testator. There was no technical idea in the mind of the testator that, when all his particular provisions had failed, the question of who were his next of kin was to be referred back to a distant period, to ascertain who filled that character at the moment of his own death. He might not really anticipate that all his special provisions would fail, and no doubt hoped that they would not, but he put that final clause into his will to meet the improbable, though of course not impossible, contingency, that they might do so. If that improbability should occur, he desired that it then should be decided who were, at that time, his next of kin. He did not, as had been done in some of the cases, suggest his own death and intestacy. *Long* v. *Blackall* (1) favours such a construction; and so does *Jones* v. *Colbeck* (2); and in *Butler* v. *Bushnell* (3), which was very like this case, the persons who were the testator's next of kin were to be ascertained, not at his death, but at the death of his daughter. The case of *Bullock* v. *Downes* (4) is not decisive of the present, but is distinguishable. There the time of the testator's death was distinctly indicated as that at which the class was to be ascertained. Here it is not; but, on the contrary, the testator suggests the death of the last daughter as the time. In *Bullock* v. *Downes* the words were, "in trust for such persons of the blood of me as would by virtue of the statute of distributions of intestates' estates have become and been then entitled thereto, in case I had died intestate." There the reference to his own death and intestacy fixed the date. Here the death spoken of is that of "my last surviving daughter," when the fund is to be paid "to such person as will then be entitled to receive the same as my next of kin under the statute." Connecting these two phrases together, it was clear that the testator contemplated the next of kin as those who would be so on the death of his last surviving daughter. All the cases shewed that, in the

(1) 3 Ves. 486.
(2) 8 Ves. 38.
(3) 3 My. & K. 232.
(4) 9 H. L. C. 1.

construction of such a bequest, the intention of the testator must govern. *Briden* v. *Hewlett* (1) did so, and there the mother of the testator having died after him, the testator's next of kin at her death were held entitled. In *Wharton* v. *Barker* (2) the same principle was adopted; and in *Lees* v. *Massey* (3) the Lord Chancellor took the death of the testator's daughter as the period for ascertaining the next of kin, and both the Lord Chancellor and Lord Justice *Turner* declared that in such cases the intention of the testator furnished the governing principle. Here it is submitted that the intention of the testator clearly applies to the death of his last surviving daughter, and that the decision of the Vice-Chancellor ought therefore to be restored.

Mr. *Kay*, Q.C., and Mr. *Renshaw*, for the Respondents, were not called on to address the House.

THE LORD CHANCELLOR (Earl *Cairns*):—

My Lords, I am bound to say, in the first place, that it appears to me that this case is absolutely undistinguishable from the case of *Bullock* v. *Downes* (4); indeed, it is seldom that you find with regard to wills two cases so much resembling each other, and if your Lordships were to arrive at the conclusion at which Vice-Chancellor *Bacon* has arrived, it would be tantamount to overruling (if your Lordships could overrule it), that decision. But, my Lords, apart from that authority, which of course is a paramount authority, it being a decision of your Lordships' House, it appears to me that if you had in the first instance, to consider the construction of this will, it would on principle, and on the authorities which preceded *Bullock* v. *Downes*, be impossible to come to any other conclusion. In the words of this particular will there is a gift to a class of persons who are thus described, "my next of kin under the statute for the distribution of intestates' estates." That is a class which, according to the statute, must be ascertained at the death of the testator; and, as I took the liberty to mention during the argument, it is not an artificial class of next of kin to be created.

(1) 2 My. & K. 90; 1 L. J. (Ch.) 119.
(2) 4 K. & J. 483.
(3) 3 De G. F. & J. 113.
(4) 9 H. L. C. 1.

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The only other words are "that the same be paid to such person or persons as will *then* be entitled to receive the same." Now, I am quite willing to look at the word "then" as if it meant at the expiration of the preceding limitation, but then what does this amount to? Why this. At the expiration of the preceding limitation you are to find out the hands into which you are to pay the money, but you must do that by first ascertaining who were his next of kin at the time of his death.

Therefore, my Lords, apart from authority, it appears to me that the decision of the Court of Appeal would be right, but founded, as it properly was, on the authority of the case of *Bullock* v. *Downes*, it appears to me that that decision cannot be upset. I therefore submit to your Lordships, and move your Lordships that the appeal should be dismissed, and unless some arrangement has been made of a different character it must be dismissed in the ordinary way with costs.

LORD HATHERLEY:—

My Lords, I do not think it necessary to occupy your Lordships by saying anything on this case, for I really consider it precisely the same as the case of *Bullock* v. *Downes* (1). Every will, of course, must have its different expressions, and in each case every word must be minutely scrutinized; but when the whole of this will is read, it appears to me that the case of *Bullock* v. *Downes* must govern this case, and that case having been decided, we ought not to depart from it now.

LORD O'HAGAN:—

My Lords, I am quite of the same opinion, and I can add nothing to the observations of my noble and learned friends. I think the case of *Bullock* v. *Downes* is wholly undistinguishable from that which is now before your Lordships. I am also of opinion that if *Bullock* v. *Downes* had never been decided at all, we should arrive in this case at the same conclusion. The will appears to me to be clear enough. The testator gives certain properties, pointing to the future, and makes a devolution of them

(1) 9 H. L. C. 1.

through various stages, and at the end of all, and when all are exhausted, provides that the property shall go to "my next of kin under the statute for the distribution of intestates' estates." That plainly means the next of kin who, at the time of his death, would have been entitled, if he had not made any will.

LORD BLACKBURN:—

My Lords, I am of the same opinion. I think the present case is quite undistinguishable from the case of *Bullock* v. *Downes* (1); and having said that, I have said really quite enough, for *Bullock* v. *Downes* is, I apprehend, binding upon your Lordships as much as upon an inferior Court. I may farther say, however, that I am quite inclined to agree with what my noble and learned friends have said before me, that if *Bullock* v. *Downes* had never been decided at all, I should have decided this case the same way; indeed, I think it is even a clearer case than *Bullock* v. *Downes*.

LORD GORDON concurred.

Decree appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 15th May, 1879.

Solicitor for the Appellant: *John Watson.*
Solicitor for the Respondent: *Charles Langley.*

(1) 9 H. L. C. 1.

[HOUSE OF LORDS.]

H. L. (E.) 1879 *May* 1, 5, 8, 9, 12.

OWEN ELIAS, WILLIAM ELIAS AND OTHERS APPELLANTS;

AND

THE SNOWDON SLATE QUARRIES COMPANY, AND THE WEST SNOWDEN SLATE COMPANY . . . . . } RESPONDENTS.

Mines—Quarries—Term of Years—Reversioner.

A termor of land, with no grant of a power to work quarries on the land, cannot open any in order to work them; but if the quarries have been worked before the commencement of the term, he may continue the working.

The owner of land demised it in 1802, by way of mortgage, for a term of 500 years at a peppercorn rent. A quarry, called the lower quarry, appeared to have been then open on the land, and had been worked by the mortgagor. In 1820, the mortgagee foreclosed the equity of redemption, and took possession of the property, and worked not only the lower quarry, but another, which received the name of the upper quarry. In 1873 the Plaintiff, the reversioner of the term of 500 years, having, not long before, become acquainted with the fact that he was the reversioner, filed a bill to restrain the termor from working the quarries and for an account. At the trial the great dispute of fact was as to the time when the upper quarry had been opened. Vice-Chancellor *Hall* had thought that it was not shewn to have been opened in the time of the mortgagor, and so granted, as to that, an injunction and account. The Court of Appeal came to a different conclusion on the evidence and dismissed the Plaintiff's bill. On appeal to this House the decision of the Court of Appeal was upheld.

Where the lease of a quarry reserves, not the payment of a fixed sum by way of rent, but a share of the profits of the quarry, it is to be treated as opened for purposes of commerce.

The consideration of the facts and circumstances of a case must determine on whom the *onus* lies of shewing when a mine or quarry was first opened for working.

A mine or quarry opened by the owner of the inheritance, while he was still in actual possession, even though after the date of the mortgage, will enure for the benefit of the mortgagee.

Per LORD SELBORNE:—Where a mine or quarry has been opened for a restricted or definite purpose, as to obtain fuel, or the means of repairing a particular tenement on the estate, that would not give a tenant for life, or other owner of an estate impeachable for waste, the right to work it for commercial profit. But when a mine or quarry is once open, so that the owner of an estate impeachable for waste, may work it, the sinking of a new pit on the same vein, or the breaking ground in a new place on the same rock, is not, *necessarily*, the opening of a new mine or a new quarry.

ROBERT BULKELEY OWEN was the owner in fee simple of a farm called *Fridd-Issan*, in the parish of *Beddgelert* in *North*

Wales. He borrowed a sum of £400 from *Morris Griffith* in 1802, and by way of mortgage security demised the farm to *Griffith*, his executors, administrators, and assigns, for a term of 500 years, at a peppercorn rent. He afterwards borrowed a farther sum of £800, and in September, 1810, charged the same with interest upon the mortgaged premises. The premises were situated partly at the base, and partly on the slopes of *Snowdon*. In 1808 *Owen* granted a lease of the farm, and in 1811 a lease for twenty-one years of the mines and slate quarries under the whole property. In 1816, *Griffith* brought an action of ejectment to obtain possession of the farm, and recovered judgment in the action in 1818. He also instituted a suit for foreclosure, and obtained a decree thereon in 1820. He thus became possessed of the whole property, and in 1830 seemed to have made an attempt to work for the slate. He died in 1835, and the property passed to his widow, to his son *John Griffith*, and then to his son *William Morris Griffith*, who was originally a Defendant in this suit. In May, 1847, *John Griffith* made a lease of the farm in question with liberty to search for and get slate, &c., under the said tenement, and this lease passed to the "*Snowdon Slate Quarries Company*," and on the winding-up of that company, was sold by the liquidator to the "*West Snowdon Slate Company*." In the course of the proceedings in this sale, namely, in December 1872, an objection to the title was taken, and in consequence a letter was written to the present Appellants—the persons who appeared to be the reversioners after the expiration of the term of 500 years—and they, in May, 1873, filed their bill against *W. M. Griffith* complaining of the working of the quarries as waste, and asking for an injunction to restrain farther working, and for accounts, and for farther relief. This bill was afterwards amended by making the two companies parties to the suit.

The various Defendants put in answers which in substance set forth the facts already stated, and relied on them for a defence, and they also alleged that the quarries were open working quarries upon the lands comprised in the demise and mortgage of 1802. Whether the upper quarry was so, was the matter really in dispute, and on that a great deal of evidence was given. Its effect is fully stated in the judgments.

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Vice-Chancellor *Hall* was of opinion that the lower quarry had been open before the demise of 1802, but "that neither the mortgagor nor his lessees, while he remained in possession, opened a quarry elsewhere on the mortgaged premises," and therefore, as to the upper quarry, he granted the prayer of the bill for an injunction and account, but dismissed it as to the lower quarry (1). On appeal the Lords Justices came to a different conclusion on the evidence, reversed the decision, and ordered the bill to be dismissed with costs (2). This appeal was then brought.

Mr. *Osborne Morgan*, Q.C., and Mr. *Ford North*, Q.C. (Mr. *Edward Rolland* was with them), for the Appellants:—

They stated the facts of the case with great minuteness, and insisted that there was no evidence to warrant the conclusion that the owner of the inheritance ever worked both mines or quarries with a view to profit—or had ever authorized them to be so worked—and especially it was clear that there had not been, by him, such working of the upper quarry before the mortgage demise. Assuming the fact to be so, then the conduct of the Respondents in working both of them was without warranty in law. They were mere termors, and as such their working the mines or quarries amounted to voluntary waste, from the committing of which the Court would, upon equitable principles, restrain them. There had not been any laches here, and the Appellants proceeded as soon as they were aware of their rights: *Moyle* v. *Mayle* (3); *Coppinger* v. *Gubbins* (4); *Purcell* v. *Nash* (5); *Mansfield* v. *Crawford* (6); *Viner* v. *Vaughan* (7); *Jegon* v. *Vivian* (8); *Countess of Salop* v. *Crompton* (9); *Goodson* v. *Richardson* (10); *Whitfield* v. *Bewit* (11); *Bays* v. *Bird* (12); *Saunder's Case* (13); *Clegg* v. *Rowland* (14); *Vyvyan* v. *Vyvyan* (15); *Browne* v. *McClinlock* (16) were cited.

(1) *nom. Elias* v. *Griffith*, 8 Ch. D. 521, where the facts are fully detailed.
(2) Ibid. 531.
(3) Owen, 66.
(4) 3 J. & Lat. 397.
(5) 1 Jo. Ir. Eq. Rep. 625; 2 Ib. 117.
(6) 9 Ir. Eq. Rep. 271.
(7) 2 Beav. 466.
(8) Law Rep. 6 Ch. Ap. 742.
(9) Cro. Eliz. 777, 784.
(10) Law Rep. 9 Ch. App. 221.
(11) 2 P. Wms. 240; see also 3 P. Wms. 267.
(12) 2 P. Wms. 397.
(13) 5 Co. Rep. 12.
(14) Law Rep. 2 Eq. 160.
(15) 30 Beav. 65; 4 D. F. & J. 183.
(16) Law Rep. 6 H. L. 456.

Mr. *Dickinson*, Q.C., and Mr. *Bradford*, for the *Snowdon Slate Quarries Company*.

Mr. *Horne Payne*, and Mr. *C. H. Turner*, for the *West Snowdon Slate Company*.

Mr. *Dickinson*, and Mr. *Horne Payne*, addressed the House:—

It was a maxim of the law of *England* to give effect to what had been done for a series of years, and done with the knowledge of those who had the power, if they had the will, to prevent it, but who allowed it to be done without offering the least objection to it. That had been the case here, and the present claim of the Plaintiffs was therefore answered.

The evidence here was sufficient to satisfy the Judges of the Court of Appeal that both quarries were open before the Respondents went into possession of the premises, and they were therefore entitled to work them.

The cases cited on the other side were commented on, and the following were also referred to: *Gibson* v. *Doeg* (1); *Bulley* v. *Bulley* (2); *Wolfe* v. *Birch* (3); *Clavering* v. *Clavering* (4).

Mr. *Osborne Morgan* replied.

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May 12.

THE LORD CHANCELLOR (Earl *Cairns*):—

My Lords, the argument of this case has occupied at your Lordships' Bar a considerable time, but the result of that argument is that every fact in the case has, I think, been brought with great clearness before your Lordships' attention, and I shall be able in a very short space to submit to your Lordships the view which I at least take of the case now presented to us.

My Lords, I will in the first place remind you of the mortgage title. That starts in the year 1802, when the mortgage was made by *Owen*, the then owner of the inheritance, to *Griffith*, for 500 years, and I pass over as immaterial the farther charge which took place a few years afterwards. From 1816 to 1820 proceedings were going on for foreclosure of this mortgage. In

(1) 2 H. & N. 615.
(2) Law Rep. 9 Ch. Ap. 739.
(3) Law Rep. 9 Eq. 683.
(4) 2 P. Wms. 388.

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the course of those proceedings, namely in 1818, *Griffith* appears to have entered into possession, and the proceedings were terminated by complete foreclosure in 1820. From that we pass on, still only dealing with the mortgage title, till 1847, when a lease was made by a son of this *Griffith* to three persons for the purpose of adventuring in, and continuing to work, mines or quarries upon the property, and under that lease the present Respondents claim.

Now, turning on the other hand to the title to the inheritance, that continued in the mortgagor *Owen* up to the time of his death in 1837; therefore from the complete foreclosure in 1820, for seventeen years, he (the mortgagor) was in existence and was the owner of the inheritance of the property in fee simple. He died in 1837, and was succeeded by *Rice Owen*, his heir, who continued in life until 1860, a period of forty years from the foreclosure. When he died in 1860, the inheritance fell to one of the present Appellants.

That being the title to the mortgage term on the one hand and to the fee on the other, let me remind your Lordships in a few words of the actual facts which are proved with regard to the opening of the slate quarries upon the property. And I must first observe with regard to these facts, that, whatever may be their proper description, there is no controversy as to them, because they are facts which come from the witnesses on the one side only, in their evidence in chief, and in their cross-examination; and although criticisms may be made as to the limited extent to which these witnesses speak, there is nothing which shakes their credibility or their accuracy so far as they do speak.

My Lords, it is sufficient for my present purpose that I should state what I am about to state as to their evidence. Their evidence appears to me to amount to this, that in 1812 and 1814 (upon the evidence of witnesses old enough to remember those years), there were open quarry holes or quarries, whichever may be the proper word, in the *locus in quo*, that is to say, the land subject to this mortgage. It is a question upon the evidence, what the size of the openings was, but that has been left as it is upon the evidence to which I have already referred, the evidence of one side. No evidence has been contributed from witnesses equally old, or from

any witnesses at all, upon the other side. The witnesses, it is true, do not pretend to speak with certainty upon the exact size of the openings, but in a mineral country where the terms may be supposed to be well known and persons accustomed to use the terms proper to describe what actually is in existence, these witnesses all, without exception, speak of that which existed upon the property as what they would describe as open workings, and they are careful to say that they were workings which for some purpose were actually worked; for they saw certain slates taken out of them and pressed and laid on one side, and the *débris* in other places, which would shew that slates had been taken out and worked. That evidence is added to by the evidence of another witness who speaks with very considerable accuracy of what he saw in 1818. What he saw then was working of the same description; it may have occurred between 1812 and 1818, or it may have been the same working which the other (the older) witnesses saw in 1812. Then passing on to 1825, or thereabouts, your Lordships have clear testimony of working of a very much more extensive description at that time. I say "more extensive," because it appears to me the witnesses agree in saying it was carried on by a number of persons who were acting upon a system, and for some purpose or other, who were acting as a company, or as persons engaged in a common undertaking, for the purpose of either trying or carrying on the works.

Now that being the character of the evidence which is the only evidence in the case, of course it would have been perfectly competent for any person interested to shew that the working, such as I have described it to be, took place without the knowledge, and without anything that could be called consent or authority on the part of the owner of the inheritance. Nay more, it might have been shewn that the workings were actually workings by way of trespass, and had not even the consent of the termor, the mortgagee; or it might farther have been shewn that those workings were not workings of the ordinary kind for the purpose of commerce, for the purpose of disposing of that which was gained; but were workings for what I may call home consumption, for some ordinary purpose with reference to the farm on which the workings took place. Any one of those things might have been shewn, but no

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one of them has been shewn in opposition to the evidence which I have referred to, and that evidence stands, *valeat quantum*, without any counter evidence for the purpose of putting a complexion upon the character of the working which I have mentioned.

That being the state of things, then, we proceed a step farther, and your Lordships find this important element introduced into the case. It is proved without contradiction, and even I may say without controversy, that in 1811, after the mortgage had been made, for that was made in 1802, but while the mortgagor was still in possession of the property, and was representing the property, and was for all practical purposes, in accordance with the sense in which the word is commonly used, in ownership of the property, living upon, at all events exercising the ordinary acts of ownership over, the property, he made a lease covering the land subject to the mortgage. I pass by the lease of 1807. What is stated in that lease of 1811 is, that it was a lease from *Robert Bulkeley Owen* to *Richard Owen, Hugh Hughes*, and *Richard Henry Davys*, of slate rocks and beds of slate, and all mines, &c., from that date for twenty-one years at the farm of "one-fourteenth share of clear profits;" and that lease is recognised as subsisting in 1815, because in certain conditions of sale of the property advertised in that year, it was spoken of as a lease to which the property was subject.

That lease being therefore established as having been made by the owner of the inheritance at the time that he was in possession, what appears to me to result from that fact is this. It appears to me that, just as any quarry opened by the owner of the inheritance himself, even although opened after the date of the mortgage,—provided it had been opened while he still was in possession, and while he still was acting as the owner of the property,—just as any quarry opened by him, would enure to the benefit of the mortgagee after he took possession and foreclosed, and would entitle him to call that an opened quarry, and to go on and work it as a source of profit arising from the property, so also any quarry opened by the lessees under this lease of 1811 would give the same rights to the mortgagee. And, my Lords, this also would flow from the lease of 1811; it not only would result from it that any quarry opened under that lease upon any part of the property would be

lawful, but it would also stamp that quarry when opened with a commercial character, because the lease in its nature, and in its terms, is a lease for the express purpose of making money by quarrying as a commercial operation, and the product, the remuneration, upon which the landlord relies, is not a fixed sum by way of rent, but is, as it were, a sum arising from a partnership with those who were to be the tenants. He is to have a share of the profits of the quarry. Therefore, you have it in the clearest way that, provided it be established that any quarry was opened under the powers of that lease, that was a quarry the opening of which was rendered lawful by the owner of the inheritance, and was stamped by him as an opening for the purpose of commerce on the property.

Then, my Lords, that being so, the only question is, whether these openings to which I have referred, whether those quarries, which I have shewn were commenced and carried on to a certain point at all events, were quarries the opening of which is to be referred to this lease of 1811 or not. Now, my Lords, there it is that it appears to me to be extremely important to consider upon whom the *onus* in the case lies, and I am far from laying down or wishing to suggest to your Lordships any general rule with regard to the question of the person upon whom in a case of this kind the *onus* must lie. If the case is recent, if there be no lapse of time or other circumstance to be brought into consideration, if you have simply a case of a term of years granted, and the landlord comes forward and says, "I complain that my termor is working a quarry upon his land," in that state of things it may well be that it is for the tenant to answer, and to shew that quarry was opened at the time when he entered into possession. But it may be very different when a long lapse of time has occurred, and especially it may be different, and it appears to me it must be different, where your Lordships have the singular fact which I have already referred to as existing in the present case, namely, that from 1820 to 1860, at all events, for a period of forty years, there was the owner of the inheritance, of full age, competent to act, and to bind himself, and living more or less in the neighbourhood of the land in question, and that, during the whole of that time, that owner of

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the inheritance made no complaint whatsoever as regards the opening of these quarries, or the existence of these quarries, or that which was done with these quarries, at the dates to which I have referred.

Now, my Lords, that being so, and it being the case that your Lordships are called upon after this lapse of time to examine into acts which were done between the year 1811 and the year, we will say, 1825, and having it proved in evidence that those acts were done, and having before you a document which would render those acts lawful, and would make it a right and proper thing that those acts should have been done, and being called upon to say what was the power or the authority under which the acts were done, it appears to me that the presumption will be and ought to be, by any Court, that they were done under that authority which would render them lawful, unless those who are in the position of the Appellants in the present case will come forward and can satisfy you by proper and apt evidence, that the acts were done, not under the authority which would render them lawful, but were done without authority and without any connection with the lease of 1811.

My Lords, there has been no attempt on the part of the Appellants to dissever the acts which were done, from the lease of 1811. It appears to me that the *onus* lay upon them to do so. It appears to me that if there was any ignorance on their part of the lease of 1811, when it became known to them, they ought to have been able to disconnect the acts from the lease, and might have had time accorded to them by the Court for the purpose of producing evidence upon the subject. They have not produced any evidence of the kind, and in that state of things it appears to me that the legitimate and proper presumption for the Court to make is, that it was the lease of 1811 which led to and gave authority and legality to the acts done in the shape of quarrying under the property in question; and that that presumption is as strongly fortified as any presumption can be, by the farther circumstance that for forty years no complaint was made of these acts by the owner of the inheritance, who might have complained of them.

My Lords, under these circumstances, without going farther

into the details of the case, it appears to me that the conclusion of the Court of Appeal was correct; and I submit to your Lordships that this appeal should be dismissed with costs.

LORD SELBORNE :—

My Lords, I am of the same opinion.

The facts of the present case, which admit of no controversy, are that when the Respondents' predecessor in title entered into possession, foreclosed his mortgage, and became the absolute owner of the term of 500 years created in 1802, the whole of this property was subject to a lease granted by the reversioner while in possession, by which it was contemplated and intended that slate quarries should be worked in it,—without distinction of the upper from the lower part,—for commercial purposes; that the lower quarry was then confessedly open; and that the upper quarry, which alone is now in question, has been worked, to a greater or less extent, for or with a view to commercial purposes, from time to time since that date, as well during the continuance of the term granted by that lease, as afterwards; the earliest date of such working which is fixed at all distinctly by the evidence being in or about 1826, forty-seven years before the filing of the bill.

There are many circumstances, more or less material to a correct appreciation of these facts, of which neither of the parties to the present controversy has given—perhaps at this distance of time neither of them was able to give—any evidence. The existence of the lease of 1811 is proved by notes or other statements in the nature of admissions made by the solicitor who in 1815 represented the predecessor in title of the Appellant; but the lease is not itself in evidence, and any light which might have been derived from a knowledge of its precise contents is wanting. It seems to me to be uncertain, upon the whole evidence, whether *Griffith*, the mortgagee, under whom the Respondents claim, was a party to it or not. From what had taken place when an earlier lease of the lower quarry was contemplated (if not granted) in 1808, from the relations (so far as they appear) between Mr. *Williams*, who prepared that earlier lease as solicitor for both the mortgagor and the mortgagee, and Mr. *Pritchard*, who prepared the lease of 1811—and from the fact that two of the lessees of 1811 were also

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two of the intended lessees of 1808—there is, I think, a strong probability that the mortgagee would have been made a consenting party to it. But, on the other hand, it seems clear that in 1815 this lease was not among the documents of title then in the possession of Mr. *Williams*, of which an abstract was furnished by him to Mr. *Pritchard;* and in Mr. *Pritchard's* notes of that date it is described as a lease from *Robert Bulkeley Owen* to *Richard Owen*, *Hugh Hughes*, and *Richard Henry Davys*, not mentioning *Griffith*. Whether *Griffith* was a party to it or not, any workings proved to have taken place under that lease would, (I think,) have been decisive of the present controversy; and, if he was a party to it, its mere existence when his title became absolute would have been enough, in my opinion, to make the quarry now in question then open as between him and the reversioner. The working of both quarries, in or about 1826, by a company locally connected with *Carnarvon*, under a quarry agent from *Maennturog*, is left unexplained, unless it ought to be referred to that lease. On all these points the questions of *onus probandi* and of the presumptions of fact (if any) which, under such circumstances and after such lapse of time, ought to be made, become highly important.

It is not, however, without aid from some other facts, besides those already mentioned, that these questions have to be determined. There is the evidence of several old witnesses who prove that there were, before the lease of 1811 was granted, two pits (or as they call them, "holes"), already opened within a short distance of the present works of the upper quarry, from which some slates had been obtained, and dressed or prepared for some kind of use. The size of these pits or holes is a point on which the recollection of those witnesses did not enable them to speak; and it was insisted by the Appellants' counsel that they must have been of very small extent; and also (there being at that time no road to the upper quarry), that they must have been worked with a view, either to a mere search or trial of the ground, or to some repairs of buildings, or roofs of buildings, on the adjoining farm, and not for any purpose of commercial profit. The indistinctness of this evidence (considering the remoteness of the time, and the age of the witnesses) is not at all surprising; but it proves what is, in my opinion, sufficient when considered in connection with the lease of

1811 and the other facts of the case, to determine the question of *onus probandi*, as to all that afterwards took place, adversely to the Appellants. It seems to be the most reasonable and probable conclusion that those pits or holes were opened with a view to such workings as those which were at the same time actually going on in the lower quarry, and which were authorized throughout the whole estate by the lease of 1811, although they may have been in some sense experimental, and though farther works, such as roads, were undoubtedly requisite to enable any slates quarried from them to be profitably brought to market. More than this does not appear to me to have been necessary to open, *de facto*, before the lease of 1811 was granted, a quarry, the working of which might lawfully be continued, not by the lessees only, but also by the Respondents' predecessor in title, who, on the foreclosure, succeeded to all the rights of the lessor. I agree with the Court of Appeal in thinking that, under the circumstances of this case, all reasonable presumptions of fact, not inconsistent with what is proved on either side, ought to be made in favour of the lawfulness of what has so long been done.

Upon the questions of law which were argued at the Bar, I think it unnecessary to make more than two remarks. The first is, that I am not at present prepared to hold that there can be no such thing as an open mine or quarry, which a tenant for life or other owner of an estate impeachable for waste may work, unless the produce of such mine or quarry has been previously carried to market and sold. No doubt, if a mine or quarry has been worked for commercial profit, that must ordinarily be decisive of the right to continue working; and, on the other hand, if minerals have been worked or used for some definite and restricted purpose (*e. g.*, for the purpose of fuel or repair to some particular tenements), that would not, alone, give any such right. But, if there has been a working and use of minerals not limited to any special or restricted purpose, I find nothing in the older authorities to justify the introduction of sale, as a necessary criterion of the difference between a mine or quarry which is, and one which is not, to be considered open in a legal sense. Use, as well as sale, is a perception of profit. None of the *dicta* which are to be found in some of the more modern cases (each of which turned upon its own

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particular circumstances), can have been intended to introduce a condition or qualification not previously known into the law of mines.

The other observation which I desire to make is, that, when a mine or quarry is once open, so that the owner of an estate impeachable for waste may work it, I do not consider that the sinking a new pit on the same vein, or breaking ground in a new place on the same rock, is necessarily the opening of a new mine or a new quarry; and for this, authority is to be found in the cases, which were cited at the Bar, of *Clavering* v. *Clavering* (1), *Bagot* v. *Bagot* (2), and *Lord Cowley* v. *Wellesley* (3).

LORD GORDON entirely concurred with the observations of his noble and learned friends, and agreed that the judgment of the Court below must be affirmed.

Judgment appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 12th May, 1879.

Solicitor for Appellant: *J. H. Lydall.*

Solicitors for Respondent: *Best, Webb, & Co.*

(1) 2 P. Wms. 388. And see *Spencer* v. *Scurr*, 31 Beav. 334, and *Millett* v. *Davey*, 31 Beav. 470.

(2) 32 Beav. 509.

(3) 35 Beav. 635; Law Rep. 1 Eq. 656.

[HOUSE OF LORDS.]

OVERSEERS OF THE TOWNSHIP OF THE FOREIGN OF WALSALL, AND THE MAYOR, &c., OF WALSALL . . . . } APPELLANTS;

AND

THE DIRECTORS, &c., OF THE LONDON AND NORTH WESTERN RAILWAY COMPANY . . . . . } RESPONDENTS.

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June 27, 30; *July* 21.

Rate—Limit of Rateability—Not destroyed except by express Enactment or very strong Inference.

Where a privilege has been granted by an Act of Parliament, it cannot be taken away without a direct repeal of that Act, or inference from another so strong of intention to take it away, as to authorize a Court to say that the two Acts cannot stand together.

Certain Local Government Acts appointed Improvement Commissioners for sanitary purposes over a district which lay partly within and partly without the borough of *Walsall*. The Commissioners had power to levy rates to defray the expenses they were bound to incur. The rate on any railway within the Commissioners' district was, by a local Act of 1848, to be limited to one-fourth of the rateable value of the railway. A part of a line of railway did run through the Commissioners' district, and was so rated under the local Act up to 1872. By the *Public Health Act*, 1872, Urban Authorities were constituted, and the mayor, aldermen, and burgesses of the borough, in Town Council, became an urban authority, for, among others, sanitary purposes in the borough. Both bodies, the Commissioners and the Town Council, were given powers to make rates to defray the expenses incurred by them in the discharge of their respective duties. In the grant, to the town council, of rating powers, nothing was said with regard to any limit of rating upon any particular kind of property. By the *Public Health Act*, 1875, the Town Council was invested with powers to assess a rate to defray the expenses incurred for sanitary purposes, and the powers of a local board were transferred to it as the Urban Authority; and it was provided that expenses incurred by the Urban Authority, if the Council of a Borough, were to be defrayed out of the Borough fund, but if by the Improvement Commissioners were to be defrayed out of the district rate. One section continued the limit of the Act of 1848 as to rating railway property. By a local Act of 1876 the limits of the borough were greatly extended, and the mayor, &c., of the borough became the Sanitary Authority for the extended borough. The Act of 1848 was repealed, with the exception of certain sections. Among the excepted sections that one which limited the amount of rateability of

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railways was not mentioned, but nothing was said specifically to put an end to that limited liability:—

Held, upon the true construction of the various Acts, public and local, that there having been no express revocation of the privilege granted in respect of rating the railway at only one-fourth of its rateable value, a borough rate calculated on its full rateable value could not be maintained.

THIS was an appeal against a decision of the Court of Appeal, which had affirmed a previous decision of the Queen's Bench Division, on the subject of a rate assessed on the Respondents in respect of that part of their railway which was within a portion of the Foreign of *Walsall* not within the borough.

On the 1st of December, 1876, the rate was made assessing that part of the railway which was within a part of the foreign of *Walsall* at its full rateable value. There was an appeal against this rate on the ground that the town council of the borough had no authority to make such a rate, that the assessment ought only to have been on one fourth of the rateable value of the property situated within the foreign. The sessions had ordered the rate to be amended. The case was then taken to the Queen's Bench Division, where the decision of the sessions was affirmed. The overseers carried the case to the Court of Appeal, which, on May 18, 1878, decided (*Cockburn*, C.J., and *Brett*, L.J., *diss. Bramwell*, L.J.) that "the Court of Appeal has no jurisdiction to entertain an appeal from a decision of the Queen's Bench Division upon a rule for quashing an order as to the validity of a rate." (1) The case on this question of jurisdiction was brought up to this House, where it was held that the jurisdiction did exist (2) and the case was remitted to the Court of Appeal to be heard on the merits. It was so heard, and on the 10th of December, 1878, the Court of Appeal held that the rate was bad, and confirmed the order of the Queen's Bench Division that it should be amended (3). The present appeal was then brought.

The borough of *Walsall* was an ancient borough, with a separate Court of Quarter Sessions. It formed part of the parish of *Walsall*, and comprised the whole of the township of the borough of *Walsall* and a part of the township of the foreign of *Walsall*.

(1) 3 Q. B. D. 457.
(2) 4 App. Cas. 30.
(3) 4 Q. B. D. 141, where the facts and the various local Acts are fully set out.

Each of the townships had its own overseers, and maintained its own poor. The Appellants were the overseers of the poor of the township of the foreign of *Walsall*, and the mayor, aldermen, and burgesses of the borough. The Respondents constituted the *London and North Western Railway Company;* they were occupiers of land within that part of the foreign of *Walsall* which is within the borough, and had there, under an Act of Parliament, constructed a part of their railway for public conveyance.

In 1848, a Local Government Act called *The Walsall Improvement and Market Act*, 1848 (11 & 12 Vict. c. clxi), was passed, appointing Commissioners for sanitary purposes over a district which consisted of the whole of the township of the then borough, a part of township of the foreign which was within the limits of the old borough, and a part of the parish of *Rushall*, then lying without the borough. The district thus created was called the Commissioners' district. By sect. 40, the Commissioners were authorized to make a rate not exceeding in any one year 3*s.* in the pound, and it was provided that certain property therein mentioned, and "the occupier of any land used as a railway for public conveyance, shall not be assessed in any greater proportion than in the proportion of one fourth part only of the net value thereof."

Commissioners were specially appointed "to carry this Act and the several Acts incorporated herewith into execution." Up to 1872, that part of the railway which was within the foreign was rated according to the directions contained in the Act of 1848.

By the *Public Health Act*, 1872, urban and rural sanitary authorities were constituted, and the town council of a borough was in that borough to be the urban sanitary authority. By sect. 7 it was directed that "subject to the provisions of this Act, the Local Government Acts shall be deemed to be in force within the district of every urban sanitary authority," which was to have all powers &c., "to the exclusion of any other authority previously" exercising such powers. By sect. 16, "all expenses incurred by any urban sanitary authority under the Sanitary Acts, shall, if the Local Government Acts, or the provisions of those Acts with respect to rating, were, before the passing of this Act, in force throughout the district of such authority, or within a local government district wholly within such district, be defrayed in manner

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provided by those Acts, and if the Local Government Acts were not so in force at or immediately before the passing of this Act, be defrayed as follows: (1.) In the case of the council of the borough out of the borough fund or borough rate; (2.) In the case of Improvement Commissioners out of any rate in the nature of a general district rate leviable by them throughout the whole of their district. Provided that where an urban sanitary authority had, before the passing of this Act, power to levy within the district a rate for paving, sewering, or other sanitary purposes, all expenses incurred by such authority in the performance of its duties under the Sanitary Acts shall be defrayed out of such rates, except where, at the time of the passing of this Act, any such expenses were chargeable upon the borough fund or borough rate, in which case such expenses shall continue so chargeable."

The Sanitary Law Amendment Act, 1874, recited in sect. 3 that doubts had arisen as to the meaning of the 7th section of the Act of 1872, and enacted "that the provisions of the said Act shall be deemed to have applied to every authority acting at the time of the passing of the principal Act (1872) under the powers conferred upon them by a local Act with respect to any sanitary purposes, and that all the powers, rights, duties, &c., &c, of any authority having jurisdiction under a local Act in the district of an urban sanitary authority at the time of the passing of the principal Act, so far as they or any of them related to such purposes, were transferred to, and became attached to, the union sanitary authority therein referred to."

By the *Public Health Act*, 1875, sect. 10, where any local Act is in force within the district of an urban authority conferring on any Commissioners, &c., powers for purposes the same as, or similar to, those of this Act (but not for their own pecuniary benefit), the powers, rights, &c., of such Commissioners in relation to such purposes shall be transferred and attach to the said urban authority."

Sect. 207 of the Act provided that, "All expenses incurred or payable by an Urban Authority in the execution of this Act, and not otherwise provided for, shall be charged on and defrayed out of the district fund and general district rate leviable by them under this Act subject to the following exceptions, viz., that if in any

district the expenses incurred by an urban authority, being the council of a borough, in the execution of the Sanitary Acts, were at the time of the passing of this Act payable out of the borough fund, or borough rate, then the expenses incurred by that authority in the execution of this Act shall be charged on and defrayed out of the borough fund or borough rate; and that, if in any district, the expenses incurred by an urban authority, being Improvement Commissioners, in the execution of the Sanitary Acts, were at the time of the passing of this Act payable out of any rate in the nature of a general district rate, leviable by them as such Commissioners throughout the whole of their district, then the expenses incurred by that authority in the execution of this Act shall be charged on and defrayed out of such rate; and that where at the time of the passing of this Act the expenses incurred by an urban authority in the execution of certain purposes of the Sanitary Acts were payable out of the borough fund and borough rate, and the expenses incurred by such authority in the execution of other purposes were payable out of a rate or rates leviable by that authority, throughout the whole of their district, for paving, sewering, or other sanitary purposes, then the expenses incurred by that authority in the execution of the same or similar purposes respectively, under this Act, shall respectively be charged on and defrayed out of the borough fund and borough rate, and out of the rate or rates leviable as aforesaid."

By sect. 211, sub-s. (b): "The owner of any tithes, or any tithe commutation rent-charge, or the occupier of any land used as arable, meadow, or pasture ground only, or as woodlands, market-gardens, or nursery-grounds, and the occupiers of any land covered with water, or used as a canal, or towing-path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one fourth part only of such net annual value thereof."

In 1876 a local Act "*The Walsall Gas Purchase and Borough Extension Act*" was passed, and the Commissioners' district became added to the borough, the mayor, aldermen, &c., becoming the Sanitary Authority throughout the extended borough. *The Walsall Improvement Act*, 1848, was repealed, except certain sections.

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The section which limited the amount of rate on railway property was not mentioned, but nothing was said specifically to affect that limited rateability.

At a meeting of the town council, in November, 1876, a borough rate of 1*s.* 8*d.* in the pound was ordered to be assessed on all rateable property within the borough, and under this order the overseers of the foreign of *Walsall* made a rate in which the lands, &c, of the Respondent Company within that district and now within the extended borough were included, and were assessed at their full rateable value. It was the validity of this rate which was disputed, the Respondents contending that the assessment on their property ought only to have been made at one fourth of the rateable value of their premises.

The rate, as already stated, had been ordered at the sessions (by arrangement) to be, not quashed, but amended, and that order was confirmed first in the Queen's Bench Division and then by the Court of Appeal. It was now brought up by appeal to this House.

Mr. *Herschell*, Q.C., and Mr. *Anstie*, for the Appellants :—

Upon the true construction of the various Acts relating to this matter, all the duties and powers of the Commissioners have been transferred to the borough as the sanitary authority, and the special exemption as to railway property does not affect a borough rate.

Mr. *F. A. Bosanquet*, and Mr. *N. C. A. Neville*, for the Respondents :—

The Acts which have transferred the duties and power of the Commissioners have not affected the provision as to the rateability of railway property. The special provision as to that, could only be taken away by distinct enactment, or by an inevitable inference from the provision of a particular Act of Parliament. Nothing of that sort exists here.

LORD HATHERLEY :—

My Lords, the substantial question on this appeal is whether or not the Respondents as owners and occupiers of land within that

part of the foreign of *Walsall* which is situate within the borough of *Walsall*, part of which is used for a railway, and other part for railway accommodation, are liable to be assessed to a rate purporting to be made under the provisions of the Public Health Acts afterwards referred to, or any of them, at more than one fourth of the value at which their property is assessed for the rate.

It is not necessary to state the course of procedure in this case beyond saying that an order of the Court of Quarter Sessions which was made in favour of the present Respondents was affirmed by the Court of Queen's Bench, and the order of that Court was affirmed by the Lords Justices. From the order made on the last occasion the present appeal is brought.

The case depends upon the construction of several Acts of Parliament, which I think we may concur with the Court below in treating as "perplexed and difficult."

By an Act of Parliament called *The Walsall Improvement and Market Act*, 1848, Commissioners were appointed for carrying into effect certain improvements and sanitary arrangements over a district consisting of the whole township of the borough of *Walsall*, and of part of the foreign lying within the borough, and part of the adjoining parish of *Rushall* then lying without the borough, but since added thereto. For the purpose of paying the expenses of the Commissioners and making the improvements specified in the Act, they were authorized to levy an "improvement rate," but railways and certain other property therein described were not to be assessed at more than one quarter of their net value. The Commissioners had a jurisdiction extending to property outside the borough, and, again, the jurisdiction did not embrace the whole of that borough.

If the rate before us for consideration was rightly levied on the Respondents as a borough rate it will not be subject to the deduction of three-quarters of the amount assessed on the Respondents; but the Respondents contend that the rate should have been levied as a district rate under powers vested originally in local Commissioners, although these powers are now exercised by the urban authority of *Walsall*.

Several local Acts were passed between the years 1848 and 1872, which dealt with matters of sanitary regulation, and con-

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tained the same or similar directions as to levying rates on one quarter only of the assessed value of the railway property.

The *Public Health Act* of 1872 constituted urban authorities throughout the kingdom, and defined the several urban sanitary districts, that of *Walsall* being one. The more important sections of this Act as regards the question in dispute, are the 7th and the 16th. By the *Public Health Act*, 1872, sect. 4, the borough of *Walsall*, including so much of the Improvement Act district as lay within the borough, became an urban sanitary district, and the mayor, aldermen, and burgesses, acting by the council, became the urban sanitary authority for the said district, but the remainder of the Improvement Act district continued to be under the jurisdiction of the Improvement Commissioners. By the 7th section and the 16th section it is provided—[His Lordship read them: see *ante*, p. 469.]

I think that the 7th section transferred all the powers of the special Commissioners under the Acts there specified to the urban authority constituted by the 3rd section of the Act, and in particular the *Walsall* corporation, as an urban authority, acquired the powers so transferred from the district Commissioners to the exclusion of these Commissioners.

The 16th section of the Act, as it seems to me, directs all expenses to be paid as follows:—If the Local Government Acts or their provisions as to rating were in force *throughout the district of the urban authority* (which was not the case at *Walsall*), then in manner provided by the Local Acts, but if not, then, in case of the council of a borough being the authority, out of the borough fund, and in case of Commissioners by a rate to be levied by them.

There is a proviso at the end of the clause which I think is intended to express that when any urban authority reconstituted by the Act had before the passing of the Act been invested with powers of rating for special purposes and for expenses, they shall still, as reconstructed by the Act of 1872, have the same powers after the passing of that Act, and the expenses shall be paid out of the rate so levied, unless where they were then chargeable on the borough fund, in which case they should continue so to be. It seems to me that the powers, though transferred by sect. 7 to the new "urban authority," were yet intended to be kept distinct,

and were to be exercised in each district according to the Local Act of the district, though by a new body.

I next come to the Act of 1874. By the *Sanitary Law Amendment Act*, 1874, s. 3, it is provided:—[His Lordship read the section, see *ante*, p. 470.] The difficulty arose partly from the expression "urban sanitary authority" being used in the Act of 1872 with regard to the persons constituting it having exercised powers, evidently meaning before the passing of the Act of 1872, and yet the urban sanitary authority was only constituted by the Act of 1872. By this Act of 1874 it seems to have been intended to explain what the Legislature meant by "urban sanitary authority" in the Act of 1872. The result in the case before us would be that the powers given by the Act of 1872 to be exercised by the urban authority would be exercised according to the manner in which they would have been exercised by the Commissioners whom the urban authority replaced, if those Commissioners had not been constituted a new board called the urban sanitary authority. In this case the authority was not in the corporation of *Walsall* but was in special Commissioners appointed under the special Act which was referred to in the argument of this case.

This Act makes it clear that all the powers of the special local Acts were intended to be preserved, and is favourable in this respect to the Respondents. I think the whole scheme in 1872 was to preserve the powers of levying expenses exactly as they stood, and merely to transfer the powers from one set of officials to another.

We then come to an Act which was much relied upon in the Court below, and which has been, I think, deservedly relied upon in the argument in this House, the Act of 1875. The 207th section of that Act says:—[His Lordship read it, see *ante*, p. 470.]

Sect. 10 of the same Act transfers the powers and obligations, but does no more. Sect. 207 directs that all expenses shall be paid out of the district fund and general district rate leviable under the Act, subject to three exceptions.

Unless, then, the Appellants can make out that the expenses in question on this appeal fall within one of such exceptions, the rate should be levied as the Respondents desire it, viz. not out of the borough rate but out of the fund raised under the powers of the

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special Act, which provides that one-fourth only of the assessment of the railway property shall be raised.

The exceptions are, first, when at the time of passing the Act (1875) the expenses were payable out of the borough fund. This must depend, then, on the view taken of the 16th section of the Act, 1872, and I have already said that it appears to me that under the previous Acts the expenses since 1872 were payable out of the district fund and not out of the borough fund.

The other two exceptions manifestly are not such as to sanction the Appellant's contention.

I think Lord Justice *Cotton's* remark very just, viz. that we should not so construe an Act as to take away a privilege granted by a former Act without any direct repeal of that Act, or inference so strong of intention to authorize us to say that the two Acts could not stand together unless one of them is so construed. I see no such inference from the course that the Legislature has taken. It has carefully preserved the existing powers as regards the area of the rate, and has only changed the instruments which are to exercise the powers.

For these reasons I think the contention of the Appellants is wrong, and the decision of the Court below is right, and I advise your Lordships and move your Lordships to affirm the order of the Court below, and to dismiss the appeal with costs.

LORD BLACKBURN:—

My Lords, I agree with the motion of the noble and learned Lord now on the woolsack (Lord *Hatherley*).

Under the 207th section of the Act of 1875 the expenses are to be paid out of the district fund raised by a district rate unless the Appellants can shew that the case comes within one of the exceptions. It is contended that it comes within the first exception, in which case they are to be paid for out of the borough fund and raised by a borough rate. The Respondents' property is of that class which is to be rated at a lower value to a district rate and at its full value to a borough rate, and it is that which makes the question of practical importance; and the parties, when before the quarter sessions, agreed what was to be done when the question was decided: but the question of law to be decided is whether the expenses should be raised by the one way

or the other. And this depends on whether, in the borough of *Walsall*, "the expenses incurred by the urban authority in the execution of the Sanitary Acts were at the time of the passing of that Act, the 11th of August, 1875, payable out of the borough fund or borough rate?" And the answer to that question depends on whether, on the true construction of the 7th and 16th sections of the Act of 1872, coupled with the declaratory enactments of the Act of 1874, the expenses were, on the 11th of August, 1875, payable in part out of a rate to be imposed, under the rating powers of the local Act of 1848, on the portion of the district subject to the powers of the Commissioners appointed under that Act, which was by the Act of 1874 brought within the urban district. If so, the expenses, which I think means the whole expenses, were not payable out of the borough fund, and the case is not within the first exception.

I have endeavoured in vain to find out what those who framed the enactments in the Acts of 1872 and 1874 meant to be done in this respect. The powers conferred by the local Act are not put an end to, they are transferred to the urban authority, and one would say that the intention must have been that those powers thus transferred, not put an end to, should be exercised within the portion of the district transferred to the urban authority, so as to preserve unaffected the vested rights of those holding the class of property which under a rate levied under the local Act were to be assessed at a lower value. And a great many good arguments may be and were urged in favour of that view. But then they are to exercise the powers transferred to them "to the exclusion of any other authority which may have exercised the same." The rating power given by the Act of 1848 was a power to the Commissioners to make a rate over the whole of the district subject to that Act, and it is excessively difficult to understand how that power could be exercised by the urban authority to the exclusion of the Commissioners and over a part only of that district, unless by implication a power was given to the urban authority to make a new rate over that part only, which is a violent implication. I am glad that the new legislation is such as to render it unnecessary ever to impose such a rate, which it would be very difficult to make; and the proviso to sect. 16, especially as amended by the

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Act of 1874, farther perplexes the question. But I agree with Lord Justice *Cotton's* observation that it is a rule of construction that when a person or class of persons are entitled to a benefit it is to be presumed that the vested interest is respected; it is not to be taken away by a subsequent statute by general words, or unless the intention so to do clearly appears. And I may add that in sect. 16 of the Act of 1872 it is provided that when the Local Government Acts were in force in a local government district, absorbed in an urban district consisting of a borough, so as to give the owners of the class of property within that smaller district a vested interest in its being rated at the lower rate, the expenses throughout the whole urban district are to be defrayed by a district rate. This, to my mind, shews that the general intention was to respect these vested rights where they had come into operation in a part of the urban district; and the exceptions in sect. 207 of the Act of 1875 are all framed with a view to give effect to the same general principle.

I do not wish to disguise that I have not been able to understand the enactments as they originally stood in sects. 7 and 16 of the Act of 1872, and that the declaratory enactments in the Act of 1874 have to my mind made darker what was dark enough without. But I think there is no sufficient indication of an intention to depart from the general principle; and consequently I agree that the appeal should be dismissed, with costs.

LORD GORDON:—

My Lords, the Acts are complicated, but on a careful consideration of the case I have seen no reason to doubt that the Courts below have arrived at a right result. I concur so entirely in the views so well expressed by Lord Justice *Cotton* and in the judgment which has been delivered by the noble and learned Lord now on the woolsack, that I consider it unnecessary to say more than that I think the judgment appealed from should be affirmed.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 21st July, 1879.

Solicitors for Appellant: *Sharpe, Parkers, Pritchard, & Sharpe.*
Solicitor for Respondent: *R. F. Roberts.*

[HOUSE OF LORDS.]

ARCHIBALD ORR EWING AND OTHERS . APPELLANTS;
AND
THE REGISTRAR OF TRADE-MARKS . RESPONDENT.

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1879
June 16, 17;
July 28.

*Trade-marks—Committee of Experts—Supervision of the Court—*38 *&* 39 *Vict. c.* 91—39 *&* 40 *Vict. c.* 33.

The Committee of Experts at *Manchester*, appointed under the Trade-marks Registration Acts, is not a judicial tribunal. It is appointed to consider and give an opinion on technical matters peculiarly within the knowledge of its members. But a person dissatisfied with the opinion of the committee may move the Court of Chancery to consider it, and that Court is not bound to adopt the opinion as conclusive, even though the Court may have no reason to think that the committee has proceeded on a wrong principle, or has acted in an improper manner. Great weight is properly to be attributed to the opinion of the committee, but, it proceeds *ex parte*, and the Court may direct a full consideration of the matter before the Registrar himself.

Observations on the manner in which the Court is to exercise this supervising authority.

APPEAL against a decision of the Court of Appeal, which had discharged an order of Vice-Chancellor *Hall*.

The Appellants were merchants who carried on business as "Turkey-red" dyers and printers at *Glasgow*, and at *Levenbank*, in *Dumbartonshire*, and one principal branch of their business consisted of the manufacture and sale of a kind of cotton yarn known as the "Turkey-red" yarn, which was largely exported to the East. In this trade they were accustomed to use certain trade-marks, and they applied for registration of those trade-marks under the Trade-marks Acts, 1875–6 (1). Under those Acts a body of persons known as the *Manchester* Committee of Experts was appointed by the Commissioners of Patents to examine and declare their opinions on such applications. These experts were to take their instructions from, and obey the directions of, the Commissioners (2).

(1) 38 & 39 Vict. c. 91; 39 & 40 Vict. c. 33.

(2) The Lord Chancellor had power to make the Rules under the Acts. One of these rules directed that the Chancery Division of the High Court of

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On the 9th of August, 1877, the Registrar of Trade-marks wrote a letter to the Appellants, in which he stated that the committee had placed certain of their marks, as to which the Appellants had applied for registration, in the first of the two classes into which such marks were officially divided (which meant that they would be duly registered); and on the 25th of August he wrote a farther letter, in which he said that the committee had placed four of the marks submitted for registration (numbers 1775, 1776, 1777, and 1778), in the second class, in consequence of which he declined to register them. Some correspondence ensued on this announcement, and in the course of one of his letters the Registrar said, "If an error has been made by the committee in coming to this decision in your particular case, it

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Justice should be the Court to which applications were to be made under the Trade Marks Acts. The other rules important to be considered in this case were the following. The Rules, after being laid before Parliament, were to be treated as if part of the statutes.

Rule 59. "A committee of persons versed in the usages of the cotton trade shall be appointed by the Commissioners of Patents . . . . and it shall be the duty of such committee, on or before a time to be named by the Commissioners of Patents, to divide the cotton marks, representations of which have been so sent into the *Manchester* office, into two classes, the first class consisting of such of the said cotton marks as are, in the opinion of the committee, trade-marks within the meaning of the Act, and the second class consisting of such of the said cotton marks as are not, in the opinion of the committee, trade-marks within the meaning of the Act."

Rule 62 declared that "it shall not be lawful for the Registrar to register any person as proprietor of any cotton mark in the second class of the aforesaid list, except in pursuance of an order of the Court."

Rule 68. "The Registrar, in the exercise of his powers, duties, and discretion under this Act, shall be subject to the superintendence of the Commissioners of Patents, and shall conform in every case to any instructions, directions, orders, or rules, general or special, that may be given, issued, or made by such Commissioners, or any one of them; and he shall in all cases of doubt be entitled to refer to the said Commissioners or any of them for instructions."

Among the directions given by the Commissioners of Patents was the following: "In all cases where more than three persons apply for registration of the same mark for the same description of goods, such mark must be considered as a trade-mark not within the meaning of the Act, and consequently be placed with marks belonging to the 2nd class, under Rule 59." It was under this direction that the members of the committee pronounced their opinion, that four of the marks, presented by the Appellants for registration, must be placed in the second class. The Registrar had acted on that opinion.

should be rectified by moving the Court for an order that the Registrar should proceed with your application, notwithstanding the decision arrived at." The Appellants made their application to the Court of Vice-Chancellor *Hall*, supporting it by evidence that they had used these marks for years in their business. Mr. *Joseph Fry*, the keeper of the *Manchester* branch of the Trade-mark Registry, referred to rule 59 as preventing the registration, the committee having decided that the four marks in question did not possess a distinctive character, and must be placed in the second class.

The application was heard by Vice-Chancellor *Hall* on the 15th of December, 1877, when his Lordship made an order directing the Registrar to proceed with the Appellants' application. On appeal the Court reversed this decision and discharged the order of the Vice-Chancellor (1). This appeal was then brought.

Mr. *Davey*, Q.C., and Mr. *H. A. Giffard*, for the Appellants:—

The committee did not constitute a judicial tribunal, and had no powers of a judicial kind conferred upon it. It was simply a body of experts to give advice, to express an opinion on a technical matter, but not to decide, for the Acts and the Rules alike referred to the directions which were to be given by the Court, and there would be no necessity for the Court having anything to do with the matter, if it did not possess a supervising power to control the opinion of the experts, and the conduct of the Registrar.

The Solicitor-General (Sir *Hardinge S. Giffard*), and Mr. *Rigby*, for the Respondent:—

The Legislature had intended that this matter of the registration of trade-marks should be managed by competent persons, and hence the committee of experts was appointed, and that committee was to act under the direction of the Commissioners of Patents, and the Registrar was not entitled to register any marks which

(1) 8 Ch. D. 794. In giving judgment in this case Lord Justice *James* said (at p. 805), "I am of opinion that the committee at *Manchester* was in the nature of a tribunal of commerce, or experts, and that the High Court, in dealing with a case dealt with by them, should not interfere with their decision unless satisfied that they have proceeded upon some wrong principle, or in some improper manner."

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the experts had put into the second class. The Court had a power to order the registration to be proceeded with, but the whole purport of the Acts shewed that that power was only to be appealed to where the committee had proceeded on a wrong principle, not where there had been a mere error of judgment.

THE LORD CHANCELLOR (Earl *Cairns*):—

My Lords, the question in this case is as to the right of the Appellants to register as trade-marks, under the Trade-marks Acts of 1875 and 1876, certain designs or devices which have been specially numbered as 1775, 1776, 1777, and 1778. These designs or devices are described in the application of the Appellants by different numbers, but they may conveniently be referred to by those already given.

These designs are labels for the purpose of being affixed to cotton goods in a rank of the classification under the Trade-marks Acts. Certain rules have been made under these Acts for the purpose of facilitating the decision of the numerous claims arising in reference to trade-marks for cotton goods. They are the rules numbered 57 to 63 in the general rules made by the Lord Chancellor, in pursuance of the power given by the Acts. In substance they provide that a committee of persons versed in the usages of the cotton trade shall be appointed at *Manchester* by the Commissioners of Patents; that all trade-marks used for cotton goods shall be sent in to this committee; and that the committee shall divide the cotton marks into two classes, the first class consisting of such of the cotton marks as are, in the opinion of the committee, trade-marks within the meaning of the Act, the second class consisting of such of the cotton marks as are not, in the opinion of the committee, trade-marks within the meaning of the Act. The Rules farther provide that the proprietor of a cotton mark only specified in the second class in such list, may apply to be registered as proprietor of such cotton mark in manner and subject to the conditions on which he may apply to be registered as proprietor of any other trade-mark, but that it shall not be lawful for the Registrar to register any person as proprietor of any cotton mark in the second class of the aforesaid list, except in pursuance of an order of the Court.

The Court of Appeal appears to have considered that the effect of these Rules was to constitute the committee at *Manchester* a tribunal of commerce, or of experts, to decide whether marks were, or were not, within the meaning of the Act, and to make it the duty of the Court not to interfere with their decision, unless it is satisfied they proceeded upon some wrong principle, or in some improper manner.

My Lords, I cannot think that this is the effect or intention of the rule. The Rules appear to me to provide a rough but useful way of separating, by means of the technical knowledge and judgment of the committee, the cotton trade-marks into two classes. The first class is to consist of those marks which the committee is of opinion are trade-marks within the Act, and proprietors in this class are to have the benefit, arising from this opinion, of being able at once to apply to be registered in respect of those marks. But in doing this they must satisfy the Registrar that they are the proprietors and comply with the conditions of registration as any other applicants would do. With regard to the second class there is no decision pronounced against them, but the proprietors cannot apply for registration as a matter of course. They must come to the Court, and it must be for the Court to say whether the Registrar shall proceed on their application to register or not. In deciding this the Court will have before it the circumstance that the opinion of the committee was adverse to the claim of a trade-mark; but this would be an opinion only, and not a decision, arrived at after hearing both sides, or rendered in any judicial proceeding.

I proceed farther to consider whether the Appellants are able to satisfy the Court that the marks, in respect of which they seek to be registered, are trade-marks authorized to be registered under the Act. In answering this question it is necessary to bear the frame of the Trade-marks Act, 1875, in mind. It establishes a register of trade-marks, not generally, but of trade-marks as defined by the Act, and it provides that, after a certain day, no one shall be entitled to institute a proceeding to prevent the infringement of a trade-mark as defined by the Act, unless and until the trade-mark is registered.

The definition of a trade-mark is given in sect. 10. It must

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consist of one or more of the following essential particulars, that is to say—(1.) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or (2.) A written signature, or copy of a written signature of an individual or firm; or (3.) A distinctive device, mark, heading, label, or ticket. One or more of these particulars must occur to constitute a trade-mark, and there may be added to any one or more of these particulars, any letters, words, or figures, or combination of letters, words, or figures. A qualification of this definition is added with reference to trade-marks existing before 1875; but this qualification may for the present purpose be disregarded.

Looking to the labels of the Appellants and to the evidence with regard to them, there are several matters about them which, as it seems to me, are ineffectual to create any distinctive device to the benefit of which they can be entitled. The triangular shape of the tickets, their green colour, the printing on the green in gold leaf, the curtain suspended from two animals in the corners, and the words "Prime Turkey-red," are all matters which are shewn by the evidence of *James Hannan* and others, and by the exhibits produced in the case, to have been in common use in respect of goods of this kind by many houses in the trade for a great number of years.

Putting aside these particulars it remains to be seen whether there is anything farther on the labels which will constitute a trade-mark as defined by the Act; and I may pause here, my Lords, for the purpose of observing that I cannot think the Vice-Chancellor *Hall* sufficiently appreciated the object and the provisions of the Act of Parliament when he said that he considered that, in each case, a device or label, registration of which is applied for, must be looked at as a whole, and that if it appears to be such as in the ordinary course of business would be distinguished from other devices or labels, it should be registered. To some extent no doubt this is true, but I apprehend the first duty cast upon the Court is to ascertain whether some one, or more than one, of the essential particulars of a trade-mark, as defined by the Act, is found to exist, so that the mark may be described with the one, or more than one, essential particular or particulars which distinguish it. Looking, then, to the label 1775, I find on it two

elephants as the supporters of a curtain with a crown between, and with the name of the firm of the Appellants printed in a particular manner, that is to say, in Hindostanee; in 1776 I find two elephants supporting the curtain, with a demi-lion rampant between, and the motto "audaciter;" in 1777 I find two lions supporting the curtain with a crown between; and in 1778 two lions supporting the curtain with a demi-lion rampant and the motto "audaciter" between. In 1776, 1777, and 1778, the name of the firm of the Appellants and the address "*Levenbank*" are added, and in 1775 the name of the firm, as I have already said, in Hindostanee.

Primâ facie these figures, which I have thus described, would appear to me, with the name and address of the firm added, to constitute in each case a distinctive device, within the meaning of the Act, and thus to be a trade-mark authorized to be registered under the Act. The only reason adduced to shew that these figures should not constitute trade-marks is that given by Mr. *Joseph Fry*, the keeper of the *Manchester* branch of the Trade-marks Registry. He says the *Manchester* committee decided that such devices or symbols in themselves, and by reason of the extensive use of lions, and demi-lions, and crowns, and elephants, by the trade, were not private property, and did not possess a distinctive character, so as to entitle them to be treated as marks within the meaning of the Act. In another affidavit he states that in the second class of marks he found 31 crowns, used by 18 different firms; 52 elephants, used by 30 different firms; and 137 lions and demi-lions, used by 64 different firms. In his affidavit, filed the 22nd of February, 1878, however, he states that the tickets which were before the *Manchester* committee when about to come to a decision, were, in addition to those of the Appellants, the tickets of the firms of *Stirling & Son*, *Baxenden Company*, *Henry Monteith & Co.*, *John Orr Ewing & Co.*, and *A. & F. Schoeller*. All of these tickets are made exhibits, and I have looked at them all. They contain no doubt different forms of lions and elephants, and from the circumstance that they are on triangular tickets in green and gold, they all have a certain degree of similarity; but I have already said that the form and colour of the tickets must, in my opinion, be disregarded, and, looking at the animals alone, it appears to me that there is a

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sufficient difference between the figures on the Appellants' labels and those on the other exhibits to authorize the Appellants to say that their figures constitute a distinctive device.

Whether the Appellants can establish their right to be registered as the proprietors of these marks is another question. For the purpose of establishing their right the usual process, by advertisement and otherwise, will have to be gone through before the Registrar, and it is possible that in the course of that process other persons may appear and contest, upon materials not now before your Lordships, the right of the Appellants.

Whether, again, a trade-mark for goods of this description, consisting merely, or principally, of an arrangement of elephants or lions, would be a desirable form of mark to maintain against infringers is also a different question. It may, and probably would, be the case, that no registration by the Appellants of these marks would be allowed to interfere with the continued user, by other houses, of marks with slightly differing arrangements of the same, or similar animals, which they have heretofore used, and it may be that, from the numerous forms in which these animal figures have been used on labels of this kind, nothing short of a very close imitation of the particular arrangement adopted by the Appellants would constitute an infringement. Indeed, I observe that it is stated in substance, in the affidavit of a partner in the firm of the Appellants, that the Appellants have found it necessary, in order to insure the complete identification of their manufactures, to superadd to these labels or tickets with the figures of animals another ticket called the "egg ticket," and it is on this "egg ticket" that they mainly rely as the distinguishing warranty of their goods. These, however, my Lords, are questions which it is unnecessary to consider in the present appeal.

If your Lordships agree with me in thinking that the marks of the Appellants, limited as I have supposed, are marks in respect of which the Registrar should receive the application to register under the Act, it will be sufficient that you should direct him to proceed to discharge his duty in this respect. I propose that your Lordships should reverse the order of the Court of Appeal. I do not propose that you should restore the order of the Vice-Chancellor, for this reason:—That order was prefaced by these

words, "This Court being of opinion that the mark sent in by the Appellants for registration, and claimed by them as trade-marks in connection with class 23 of the classes mentioned in the first schedule to the Trade-mark Rules, which marks have been numbered by the Registrar 1775, 1776, 1777, and 1778, are trade-marks within the meaning of the above-mentioned Act." Now the marks sent in by the Appellants for registration are, as I have said, described at one page of the Appendix, and they are described in a manner which claims as part of each mark the triangular design and printing on green paper and an imitation gold leaf. I do not think that the Court should express its opinion that these are ingredients entering into the trade-mark. I propose that your Lordships should declare that notwithstanding that the tickets of the Appellants numbered 1775, 1776, 1777, and 1778 have been placed by the committee under the Trade-marks Rule No. 59 in the second class of cotton marks, the Registrar of Trade-marks ought to proceed with the application of the Appellants to register, as trade-marks, the distinctive devices of animals on the said labels with the name and address of the Appellants' firm.

There were no costs on either side in the Courts below, and as the Registrar is obliged to have an order of the Court, it does not appear to be a case in which costs should be given.

LORD HATHERLEY:—

My Lords, I am of opinion that the order suggested by my noble and learned friend on the woolsack is one which will meet the justice of this case. The difficulty with regard to these trade-marks one perceives at once, when the evidence is entered into, it appearing that there are certain favourite emblems or signs which the natives of *Hindostan* may be thought more likely to appreciate than the name of the firm manufacturing the goods, especially if that name should happen to be written in old German, as is sometimes the case, and not in the Hindostanee character; at all events the name, as regards the bulk of the inhabitants who deal in the first place in those articles, would probably make much less impression than the crowns, the lions, and the elephants. Indeed one witness has stated in an affidavit that they always speak of

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this "Turkey-red," thus being sent out, as being marked with a lion, or marked with an elephant, or marked with a crown, or some combination of lion, crown, or elephant. And, that being so, as we are told that there are 31 crowns used by 18 firms, and 52 elephants by 30 firms, and 137 lions and demi-lions by 64 firms, it would be rash and hasty to proceed in such a manner as, by virtue of the Act, to exclude, after a definite time, by at once granting a trade-mark, any person from using that trade-mark, which must, in such a number of cases, bear considerable resemblance, so far as the mere appearance is concerned, to any other trade-mark bearing those emblems. Now the Registrar will have an opportunity, when this order is sent back to him, of seeing what is the right course to adopt, and seeing whether it is such a trade-mark as will be sufficiently distinctive to form an emblem or mark which will not be interfered with by those who come after him. I think as the matter stood before, there would be some risk undoubtedly of trade-marks being subject to repetition by persons who might have preceded the Appellants in the choice of those emblems which seem to receive favour; and probably the parties who now seek to register these trade-marks would be well advised if they took the course they took upon a former occasion, namely, of adopting some distinguishing mark, such as an egg, or as some others have done, a peacock, or some other device, rather than subject themselves to, and invoke upon others, that litigation which it was the main object of this Act of Parliament to prevent in future.

My Lords, I therefore concur in the motion which has been laid before your Lordships by my noble and learned friend on the woolsack.

LORD O'HAGAN:—

My Lords, in this case under the 59th of the Rules framed by the Lord Chancellor, in pursuance of the authority given to him by the *Trade-marks Act* of 1875, the members of the committee appointed by the Commissioners of Patents have placed certain of the cotton marks submitted to them, on behalf of the Appellants, in the second class, "as marks not within the meaning

of the Act." Under the 62nd of the Rules the Registrar has been precluded from registering the Appellants as the proprietors of four marks "except in pursuance of an order of the Court." To obtain that order, notwithstanding the act of the committee, the Appellants applied to Vice-Chancellor *Hall* accordingly, and obtained an order that the Registrar should proceed with their application to have the marks registered; in effect declaring that those marks are trade-marks within the meaning of the Act.

Against this order the Registrar appealed, and the Court of Appeal reversed it, not affirming, as of its own judgment or upon the evidence before it, that the marks were not properly trade-marks, but relying upon the opinion of the committee, which, as I understand, was held to be decisive, unless from the existence of some special circumstances; or on the ground that it had acted on an erroneous principle, or in an improper manner.

It was not shewn that there were, in the case, such special circumstances, or that there was error in principle or impropriety of conduct on the part of the committee; and the Court of Appeal held that its decision was practically conclusive as that of a *quasi* judicial tribunal, having authority, under the Rules, to settle the matter in dispute.

The short question appears to me to be, whether the judgment founded on that view ought to be maintained? And I have come to the conclusion that it ought not.

I find nothing in the Trade-marks Acts, or in the Rules, to give such binding force to the mere opinion of the committee, or to relieve the Court from the responsibility of considering whether, under all the circumstances disclosed in any particular instance, the reasons for or against that opinion should not be subjected to farther investigation? The Acts certainly give no such force to it, and the Rules merely make it effective *primâ facie* for the guidance of the Registrar, leaving his action under it to be afterwards controlled and regulated by the Court.

There is no indication of a purpose to clothe the committee with judicial authority; and it has none of the characteristics of a judicial tribunal. The property in a trade-mark may be very valuable, and should reasonably be guarded for its legitimate owner by the ordinary securities provided by our law. He should

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be at liberty, if it be put in jeopardy, to establish his title by evidence and to answer those who may wrongfully impugn it. But the proceeding of the *Manchester* committee is *ex parte*. The person claiming the mark is not allowed to be present, or to assert himself in any way; and if he is to be concluded by an opinion formed in his absence, and without his intervention, very serious injustice may manifestly result.

A proprietor of cotton marks, placed in the first class by the committee, is only authorized, by the 62nd rule, to apply to be registered "in manner and subject to the conditions on which he may apply to be registered as proprietor of any other trade-mark." The decision gives him a *primâ facie* or inchoate right, or rather a privilege of making out his title before the Registrar. It is in no way final or conclusive—and if this be so when the committee rules affirmatively, why should its negative judgment be of higher efficacy? The committee consists of persons "versed in the usages of the cotton trade." Its members require no other qualification—they may not be gifted with any special capacity to decide correctly, even though they may wish to decide fairly and honestly; and although their opinion may be of value as assisting the Registrar in the administration of his office, and in the great majority of cases may arrange the rights of parties satisfactorily and be accepted without difficulty or demur, it is pronounced under circumstances which certainly do not put it reasonably beyond the reach of animadversion, or give assurance that it may not sometimes need to be revised and rectified. I cannot conceive any judgment of anybody, more likely to require such revision and rectification than one pronounced *ex parte*, without publicity, without discussion, and deriving its sole security for correctness from the knowledge, possessed by those pronouncing it, of the usages of a particular trade.

If the view of the Lords Justices be correct, why should the Court have been required or permitted to intervene in all cases in which the Rules may disable the Registrar from accepting the trade-mark? What is there to limit its inquiry, when it is asked for the order which those Rules authorize? What is there, in them or in the Acts, to prevent the Judge from investigating for himself the question of fact as to the sufficiency of the trade-

mark, according to the conditions prescribed by the statute? And if those conditions are fulfilled, how can he refuse to redress the injustice which the rejection has involved? It seems to me that the protection designed for the trader, as well by the Act of 1875 as by the Rules to which I have referred, in affording him the right of applying to the Court, would be seriously affected if the opinion of this committee should be taken, as it has been here, to preclude farther consideration, and furnish in itself a sufficient reason for its own maintenance by an Appellate Court. The value of that opinion may be very great, and it ought, undoubtedly, to be much respected. It is pronounced by competent persons who are selected by a public department, and presumably of skill and experience in the matters with which they have to deal. It is given under the sanction of an Act of Parliament and of Rules which Parliament must be taken to have approved; and it should have great weight with an Appellate Court, and with your Lordships' House; but it does not appear to me to be of such decisive and masterful effect that *per se*, in an ordinary case, it should be held a sufficient answer to an application for its reversal, on full inquiry before the Registrar.

For myself, I am very unwilling, on a question of this kind, to put any judgment of my own against that of such a committee; but I cannot think that the duty of considering it, with all the light we can obtain from inquiry into the circumstances of the case, is not cast upon us, and that we are only bound to reach the best conclusion we can, giving due weight to the opinion, but taking it and the evidence together. And in this view, I feel constrained to concur with the proposal of the Lord Chancellor, and say, that the application should go before the Registrar; and that he should proceed with it in the ordinary way. Full justice will thus be done—persons having real interests will be heard, testimony will be fairly considered—the ruling of the committee will be before the officer, and he will take it into account, and the property in the disputed trade-marks will be adjudged to the Appellants if it belongs to them.

I will not weary your Lordships by going over again the proofs by which my noble and learned friend has sustained his conclusion, but simply repeat that it has my entire concurrence.

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LORD BLACKBURN :—

My Lords, in this case the Appellants, who are extensively engaged in the manufacture of cotton yarns dyed with Turkey-red, applied to have ten different trade-marks registered as cotton marks under the Trade Marks Registration Acts, 1875 and 1876. Pursuant to the Rules made in August, 1876, those trade-marks were sent to the *Manchester* office, and were submitted to the committee appointed under rule 59. That committee put five of those marks in the first class, as being, in their opinion, trade-marks within the meaning of the *Trade-marks Registration Act*, 1875, and as to these no question arises. Five of the marks, numbered respectively 1775, 1776, 1777, 1778, and 1784, were placed only in the second class, as being not, in the opinion of the committee, trade-marks within the meaning of the Act. It is not disputed that the committee really was of that opinion. It is contended that the opinion was erroneous; but, however that may be, the committee, being of that opinion, was, I think bound to act upon it, and place these five marks in that second class.

Rule 62 provides that "it shall not be lawful for the Registrar to register any person as proprietor of any cotton mark in the second class of the aforesaid list *except in pursuance of an order of the Court.*" The Registrar, therefore, properly refused to register any one of the five marks unless there was such an order.

On application to Vice-Chancellor *Hall*, the Court, being of opinion on the evidence that the five marks were trade-marks within the meaning of the Acts, notwithstanding that the committee of experts under rule 59 had placed the said marks in the second class of cotton marks as not being, in its opinion, trade-marks within the meaning of the said Acts, ordered that "the Registrar of Trade-marks do proceed with the application of the applicants to register the said trade-marks as aforesaid, notwithstanding that the same have been so classed." The Vice-Chancellor acted upon affidavits and exhibits produced by both the Appellants and the Respondent. He construed the Acts and Rules as making it the duty of the Court to decide, as a question of fact, whether the marks were, or were not, trade-marks within the meaning of the Acts, notwithstanding the opinion of the committee.

The Registrar appealed against the order as far as it related to the four marks numbered respectively 1775, 1776, 1777, and 1778. As to the other mark, numbered 1784, there has been no appeal, the Registrar and those who advised him being apparently convinced that the committee had in that case made a mistake; and it would be unnecessary to mention it at all, if it were not that the evidence before your Lordships was directed to all five, and would not be quite intelligible unless this mark, 1784, was mentioned. On appeal the Lords Justices reversed the order of the Vice-Chancellor without determining whether the opinion of the committee was proved to be wrong or not, on the ground that the decision of the committee should be acted upon unless it was proved that the committee proceeded on some wrong principle or in some improper manner; and, if this is the true construction of the Acts and Rules, it is not necessary to decide anything more than that there was no evidence of the committee having done so; and I agree with the Lords Justices that there was no such evidence.

But it is contended that the true construction of the Acts and Rules is, that if the Court is satisfied that the applicant is a "person who is for the time being entitled to the exclusive use of such trade-mark in accordance with this Act, or otherwise in accordance with law," and that the Registrar has refused to enter his name on the register as proprietor of that trade-mark, so as, under sect. 5 of the Act of 1875, to entitle him to an order to rectify the register—the Court ought to make an order under the 62nd rule, though the refusal to register was in consequence of the adverse opinion of the committee; and, if that be the true construction, it is necessary to inquire whether the finding of the Vice-Chancellor on the questions of fact was right.

My Lords, I propose to consider, first, the question whether, on the true construction of the Acts and Rules, the committee is made a tribunal of experts, whose decision is to be final, unless, as is said by Lord Justice *Baggallay*, some special circumstances exist, or, as is said by Lord Justice *James*, unless it be shewn that the committee has proceeded on a wrong principle or in some improper manner. The Appellants' counsel contend that the committee, which decides entirely *ex parte*, is not in the nature of

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a tribunal at all, and that the true construction of the Acts and Rules is, that it shall be a condition precedent to the acting of the Registrar that this committee should think the trade-mark one within the Act of 1875; but that their opinion was not binding on the Court. I think the counsel were inclined to argue that the decision of the committee should have no more weight than the evidence of so many persons who knew more or less of the trade. I think that was going too far. I think that considering their position and the manner in which they are selected, their decision ought to have much weight, and throws upon the person applying for an order a considerable *onus* to prove it erroneous. But, subject to this remark, I agree with their argument. I cannot agree with the opinion of the Lords Justices. This is a question depending on the construction of the two Acts of 1875 and 1876, and of the Rules, which have the same validity as if enacted by Parliament.

Before 1875 it had, I think, been established that when a person had used a mark on his goods so as to distinguish them from the goods of any other person, he had a property in that mark to such an extent as to entitle him to an injunction to prevent any other person from continuing to use, on other goods, a mark so similar to his mark, as in fact to mislead the public into taking them for those of the person who owned the mark; and that this was on the ground that the right to use the mark was his property, so that it was not necessary for the purpose of prevention to prove fraud or an intention to mislead. I think that, at least from the time of *Millington* v. *Fox* (1), decided by Lord Chancellor *Cottenham* in 1838, to *Wotherspoon* v. *Currie* (2), decided by this House in 1872, it has been considered that, for the purpose of prevention of infringement, the exclusive right to use a trade-mark was a right of property.

The mark must have been so used as to have come to be known to designate the goods of the Plaintiff, and it could not do so unless it was to some extent special and distinctive; but it was a question in each case on the evidence whether it had come to be so known or not; and frequently it was a question on the evidence whether, having once been so known, the owner of it had per-

(1) 3 My. & Cr. 338. (2) Law Rep. 5 H. L. 508.

mitted it to be so extensively used by others that it had ceased to be so known; and, as might be expected, there was much litigation; sometimes no doubt arising from improper attempts on the part of the Plaintiff to have a monopoly of the manufacture of goods of a particular kind, but more frequently from improper attempts on the part of the Defendants to obtain the benefit of the Plaintiff's reputation for skill and honesty, by using his trade-mark, or one like it. In providing a remedy for this inconvenience, there was obviously much more difficulty in dealing with existing trade-marks in which there was a vested right of property, than in dealing with new trade-marks, as to which no one as yet had a vested right. According to the usual course of legislation in this country, vested rights of property are to be respected, and not interfered with farther than is necessary; but as to rights to be acquired hereafter, it is merely a question of expediency what conditions the Legislature may think fit to attach to the acquiring of those rights.

The Act of 1875 seems to have been framed in conformity with these principles. I think it convenient first to consider what was the construction of that Act as it originally passed, and then to inquire how far it has been altered by subsequent legislation. The 1st section (which has been altered by subsequent legislation) provided that after the 1st of July, 1876, no person should be "entitled to institute any proceeding to prevent the infringement of any trade-mark as defined by this Act, until and unless such trade-mark is registered in pursuance of this Act." This is altered by the Act of 1876, which I shall notice afterwards. It is confined, as will be seen, to prevention, as to which at least there was a right of property. This section applied to those who already had a right of property in a trade-mark, and did impose some restriction upon them. But it was necessary for the object of the Legislature that they should be required to register; and if there were proper provisions to secure that every person who could prove that he had a right of property in a trade-mark, should be entitled to have it registered, the inconvenience to him would be extremely slight. The provisions to secure this object are, as I think, to be found in sect. 5.

Before, however, saying anything as to the construction of that

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section, I think it better to notice the other sections of the Act, which are not long. Sect. 2 attaches the trade-mark to the good-will of the business, and then provides "that registration of a trade-mark shall be deemed to be equivalent to public use of such mark." This is for the benefit of those making new trade-marks. As the law at present stands, if the mark be not already in use, and is sufficiently distinctive to distinguish the goods to which it is applied as being those of the person using it, the public use of that mark gives a property in it. But it is open to others to prove that what was alleged to be an infringement on that trade-mark had been done before, and so that the alleged trade-mark was not sufficiently distinctive. Sect. 3 makes the registration for five years *primâ facie* evidence, and, after five years, conclusive evidence of the title. This would be a hardship on any person who was already rightfully using a mark so like that which was now registered as to be an infringement of it, unless some provision was made for enabling such persons to expunge the trade mark from the register. This also is, as I think, provided for by sect. 5. Sect. 6 provides that in certain cases the Registrar shall not, without the special leave of the Court, register a trade-mark. Sect. 7 authorizes the making of rules, and may for the present be passed by. Sect. 9 relates to trade-marks on cutlery, as to which there had been special legislation ending in the *Cutlers' Company Act* of 1860, and does not, I think, throw any light on the construction of the rest of the Act. Sect. 10 begins by providing for what shall be the requisites in a trade-mark. The first four provisions point out what shall be sufficient in old trade-marks, and essential in new ones. But the vested property of those who are already owners of trade-marks is protected by providing, in addition, that "Any special or distinctive word or words, or combination of figures or letters used as a trade-mark before the passing of this Act may be registered as such under this Act." The four marks now in question, Nos. 1775, 1776, 1777, 1778, are alleged by the Appellants and found by the Vice-Chancellor to come under this last definition. The Court of Appeal has thought it unnecessary to determine whether they did so or not, inasmuch as the committee had been of opinion that they did not.

Now, bearing in mind those provisions, what is the construction of sect. 5? "If the name of any person who is not, for the time being, entitled to the exclusive use of a trade-mark in accordance with this Act, or otherwise in accordance with law, is entered on the register," which, as already pointed out, might, under sect. 2, and still more under sect. 3, be a grievance to his rivals in trade, "or if the Registrar refuses to enter on the register, as proprietor of a trade-mark, the name of any person who is for the time being entitled to the exclusive use of such trade-mark in accordance with this Act, or otherwise in accordance with law;" this is the category within which the Appellants contend that they come,— "or if any mark is registered as a trade-mark which is not authorized to be so registered under this Act, any person grieved may apply in the prescribed manner for an order of the Court that the register may be rectified; and the Court may either refuse such application, or it may, if satisfied of the justice of the case, make an order for the rectification of the register." By the 42nd and 43rd rules the Court is the Chancery Division of Her Majesty's High Court of Justice, and the prescribed manner of making the application is by motion, or by application at Chambers, or in such other manner as the Court may direct.

Pausing here, I cannot construe this section as meaning anything else than that, when the Court of Chancery is satisfied that the applicant is a person who is for the time being entitled to the exclusive use of a trade-mark in accordance with law, and that the trade-mark is one within the definition in sect. 10 of the Act of 1875, the Court is, *ex debito justitiæ*, to rectify the register, just as it would, before the Act of 1875, have been bound *ex debito justitiæ*, on similar proof, to prevent any one infringing the trade-mark shewn to be his property. The burden of proof lies upon the person making the application to amend the register; but if he does produce such proof as would in the opinion of the Court entitle him to an injunction, I do not think that the words "if satisfied of the justice of the case," can, or ought to be, construed as meaning to give the Court a discretion to consider, whether the nature of the trade-mark is such as to make it inconvenient that he should exercise the right of property which it is proved he actually has.

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The 1st section of the Act as it then stood took away all right to proceed for an injunction unless the trade-mark was registered, but, apparently, left the right to sue for damages unaffected. This afforded an additional reason for construing the 5th section as I have done, but by no means the only one.

Then came the Act of 1876, which extended the time for registering trade-marks to the 1st of July, 1877, which time was farther extended under the Act of 1877 and an Order of Council to the 30th of June, 1878. By this Act of 1876 the 1st section of the Act of 1875 was repealed, and there was substituted for it an enactment that "a person shall not be entitled to institute any proceeding to prevent, or recover damages for, the infringement of any trade-mark as defined by the principal Act until or unless such trade-mark is registered in pursuance of that Act, or until and unless, with respect to any device, mark, name, combination of words, or other matter or thing in use as a trade-mark before the passing of the principal Act, registration thereof has been refused as hereinafter mentioned." Sect. 2 provides for the proof of such refusal by a certificate. This alters the Act of 1875 in two respects; it renders registration a condition precedent to a proceeding to recover damages, as well as to a proceeding to prevent infringement; and it provides that if the proprietor of a trade-mark in use before the passing of the principal Act has been refused registration, he may, notwithstanding such refusal, institute proceedings either for prevention of or damages for the infringement of such trade-mark, and need not wait till he has got the register rectified.

But, does this alter the construction of sect. 5, or take away his right to have the register rectified if sect. 5 gave him such a right? Lord Justice *James* seems to think it does. I am unable to come to that conclusion. It seems to me that the effect of the Act of 1876 is that if one who says he is the proprietor of a trade-mark wishes to institute proceedings against some one who, as he says, is infringing it, he must first try to have his trade-mark registered. If the registration is refused, for any reason, he may apply, under sect. 5, to have the register rectified, and then the Court will have to determine as the principal question whether the reason of the refusal was sufficient. But he may also seek for

more speedy redress. He may obtain a certificate of the refusal and then institute proceedings to prevent the infringement, and then the Court will have to determine whether he was the proprietor of the trade-mark, and in doing so will have incidentally to determine whether the reason of the refusal was sufficient; for I take it that he cannot obtain an injunction unless he proves, to the satisfaction of the Court, that the alleged trade-mark was "a special and distinctive word or words, or combination of figures or letters used as a trade-mark before the passing of the Act," and that "he was for the time being entitled to the exclusive use of such trade-mark in accordance with law." And if he proves that, he is entitled to have the register rectified.

But reliance is placed by the Respondent on the Rules. Those Rules were framed under the authority of sect. 7 of the Act of 1875, but after the passing of the Act of 1876, and I feel no doubt that they must be construed along with both of those Acts. An argument was used that the power given by sect. 7 to make rules was limited to making rules for a particular set of objects; and that a rule repealing sect. 5, and depriving the Court of the power given it to rectify the register, would not be made in pursuance of that section, and therefore would not have the same validity as if enacted by Parliament.

It has never been necessary to determine whether a Court of law can declare a rule made under such an enactment *ultra vires;* there would be great difficulty in doing so, and it is quite unnecessary to inquire how that may be in the present case, for the rules relating to cotton goods are, I think, completely within the object of sect. 7, and are so far from depriving the Court of its power to review the decision of the Registrar, that rule 62 expressly preserves it. The rules in question are the 59th, the 60th, and the 62nd. I do not think it is necessary at present to read them.

It seems to me a very reasonable regulation as to the mode of registration, that the opinion of such a body as that constituted by the 59th rule should guide the Registrar, as to whether a trade-mark was so distinctive as to answer the purposes of the Act. With regard to a new trade-mark the object of the person applying to register it must be to choose a trade-mark such that it shall be clear to all who see it, that it is distinctive; and I can hardly

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suppose that any one who was told—your proposed new trade-mark is in the opinion of the committee so like old marks as not to be distinctive—would be so foolish as to insist on registering it. He would at once change his proposed trade-mark to something clearly different from anything that was in common use. All that is stated on the affidavits as to the practice of the committee as to not allowing lions, elephants, crowns, representations of factories, and the like, to be used as trade-marks, seems to me very sensible; and, whether strictly binding or not, will, I have little doubt, never be questioned as to new trade-marks. But as to old trade-marks the case is very different. The mark may have been originally injudiciously chosen, as being so little distinctive as to tempt persons, who wish to have the benefit of infringing it without actually doing so, to come near it; but still, if it has acquired a trade signification, it cannot now be changed without the loss of a valuable property. No rule that I can find gives power to the committee to call upon the applicant to support his claim, nor gives an applicant a right to be heard before the committee; and I think from the nature of the body it could never have been intended that it should hear the parties, or come to anything in the nature of a judicial determination. It is reasonable to say, if selected persons who presumably know a great deal of the usages of the cotton trade, are of opinion that a mark is or is not distinctive, that shall *primâ facie* be taken to be right. The Registrar shall act on that opinion, but the party aggrieved by it may appeal to the Court.

But it would not, I think, be reasonable, or according to the usual idea of justice, that these persons should determine on a question of property without a hearing. The fact, therefore, that the proceedings of the committee are by the Rules entirely *ex parte*, in my opinion goes very far indeed to shew that the opinions of the committee were not meant to be final, even to the limited extent to which the Court of Appeal think them binding. But I think it rests on the Respondent to shew that these Rules are so framed as to make this decision binding, and I find no words to express that the appeal expressly reserved to the Court by the 62nd rule, shall be clogged by anything more than that weight which common sense requires should be given to the opinion of such a body.

I have already pointed out that, according to what I consider the construction of the Act of 1876, the Appellants might, on obtaining a certificate of refusal, institute proceedings to prevent anyone from infringing these four trade-marks. In doing so they would have to make such a case as, in the opinion of the Court would outweigh the opinion of the committee. I cannot but think that if they make such a case now, they are entitled to an order, though not precisely that which the Vice-Chancellor made. I am, therefore of opinion that your Lordships cannot dispose of this case without determining the question of fact, whether the Appellants have proved that each of the four trade-marks is a special and distinctive word or words, or combination of figures or letters, used as a trade-mark before the passing of the Act of 1875, though the committee were of opinion it was not. The evidence as to this point is not so voluminous nor so conflicting as at first glance it seems.

Archibald Orr Ewing, the senior member of the Appellants' firm, makes an affidavit referring to the five marks, and all five are exhibits, of which facsimiles are to be found in the Appendix. The Appellants also filed eight affidavits, some by members and workmen of their firm, and some by independent persons, one of whom comes from *India*, stating their knowledge of the four marks now in question. In each of these there is repeated the same paragraph, viz.: "During the whole of these periods respectively, the said several labels have to my knowledge been in use, and I believe them to be well known and recognised in the trade, and by purchasers generally as the special and distinctive labels of Messrs. *Archibald Orr Ewing & Co.*, of *Glasgow*, and as denoting that all the goods bearing such labels are of their manufacture as distinguished from the goods of other manufacturers." The evidence of these eight persons is in no way impeached by the evidence on the part of the Respondent.

On the part of the Respondent affidavits were filed before the Vice-Chancellor, and additional affidavits before the Court of Appeal. Those affidavits lead me to the conclusion that *Henry Monteith & Co.*, the first founder of which firm was the original patentee of the dye called "Turkey-red," and which firm, therefore,

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so long as his patents existed, might have a monopoly of the market for articles so dyed, originally and more than fifty years ago used a ticket, triangular, green and gold, with a curtain supported by two birds, and all subsequent tickets have been made somewhat after that pattern. This was so common, that a ticket being of a triangular form, and green and gold with a curtain supported by some sort of animals, came to signify no more than this was "Turkey-red"; but to shew that this was the "Turkey-red" of a particular manufacturer, something more was required.

The affidavit of *Joseph Fry*, the keeper of the *Manchester* Branch of Trade-marks Registry, is the most important of those filed by the Respondent. He makes two affidavits; that made before the Court of Appeal is the more full, and made with the most deliberation. I do not think it necessary, after what has been said by my noble and learned friend the Lord Chancellor, to read them. The tickets referred to in Mr. *Fry's* affidavit as being those which were so similar in design to the Appellants' as to prevent theirs from being distinctive, are also made exhibits in the Appendix.

The Vice-Chancellor looked at these exhibits and others, and thought there was quite distinction enough between them and the four marks of the Appellants. Lord Justice *Baggallay* thought that the Rules were so framed as to make it wrong in the Court to look at them and make a comparison. I cannot agree with the Lord Justice in that opinion; looking at them I agree with the Vice-Chancellor, and though I think much weight should be given to the opinion of the committee as being *primâ facie* right on such a point, yet I think, when I see what were the grounds of that opinion, that I must come to the contrary conclusion.

I therefore think that the judgment of the Court of Appeal should be reversed; and I agree that the order of the Vice-Chancellor should be varied in the way proposed.

LORD GORDON:—

My Lords, as your Lordships have gone so fully into the facts and principles which apply to the decision of this case, and I have

had an opportunity of seeing and considering the judgments which the noble and learned Lord on the woolsack, and my noble and learned friend Lord *Blackburn*, have delivered, I do not consider it necessary to do more than to say that I entirely concur in the judgment and in the motion of your Lordships.

Judgment of the Court of Appeal reversed, and case remitted to the Court below with a declaration that, notwithstanding that the tickets of the Appellants numbered 1775, 1776, 1777, *and* 1778 *have been placed by the committee, under the Trade Marks Rule No.* 59, *in the second class of cotton marks, the Registrar of Trade marks ought to proceed with the application of the Appellants to register as trade-marks the distinctive devices of animals on the said labels, with the name and address of the Appellants' firm.*

Lords' Journals, 28th July, 1879.

Solicitors for Appellant: *Phelps, Sidgwick, & Biddle.*
Solicitors for Respondent: *Hare & Fell.*

[HOUSE OF LORDS.]

H. L. (E.) 1879 — HENRY J. B. KENDALL AND OTHERS . . APPELLANTS;

AND

PETER HAMILTON . . . . . RESPONDENT.

May 26, 27; *June* 17, 20, 23; *July* 28.

Partnership—Joint and Separate Liability on one Contract—Res judicata—Law—Equity—Judicature Act.

There is no settled rule of Equity that a contract which is in terms joint, and would be so construed at Law, is to be treated in Equity as joint and several.

An action, and a judgment against two persons who had borrowed money from the Plaintiffs, (though the judgment is unsatisfied,) constitute a bar to another action brought by the same Plaintiffs against a third person, who is afterwards discovered to have been really interested, as a partner, with the two debtors in the business for the purposes of which the money had been borrowed. (*King* v. *Hoare* (1) adopted. *Diss.* Lord *Penzance.*)

This result did not depend on the doctrine of election.

Semble, per THE LORD CHANCELLOR (Earl *Cairns*):—If the case was considered as one of agent and undisclosed principal there could be no doubt about it.

K. had, under a written arrangement between himself and *W. & M.*, made large advances to them in respect of certain speculations in iron. *W. & M.* fell into difficulties. *K.* brought an action against them to recover the debt, and obtained judgment. This judgment remained unsatisfied. *W. & M.*, who resided in *Scotland*, became bankrupt there, and *K.* put in his claim under the Scotch sequestration, and recovered a small dividend. *K.* then discovered that *H.* had been associated as a partner in the speculations in iron, and brought an action against him as having been jointly liable with *W. & M.* in respect of the advances:—

Held, that the action against *H.* was not maintainable, the contract having passed into a judgment. *Diss.* Lord *Penzance*, on the ground that the objection to *K.*'s title to recover was merely one of technical procedure at Law, and that since the *Judicature Act*, 1873, the rule of Equity had, as to such a matter, superseded the rule of Law, and the rule in Equity admitted of this proceeding against *H.* the newly discovered partner.

The expression that partnership debts were treated in Equity as joint and several explained.

THE Appellants were merchants in *London*, and were the Plaintiffs in an action against *Hamilton*, the Respondent, under the following circumstances.

Messrs. *Wilson & McLay* were merchants in *Glasgow*, and had,

(1) 13 M. & W. 494.

among other matters, engaged in certain speculations in shipping old iron to the *United States*. They entered into arrangements with *Kendall & Co.* in relation to this particular part of their business. By these arrangements *Kendall & Co.* agreed to accept all such bills as should be drawn on them by *Wilson & Co.* against shipments of iron; the shipping documents were to be handed to *Kendall & Co.*, and the bills to be delivered to *Wilson & Co.* in order that they might negotiate these bills for their own use. *Wilson & Co.* undertook to provide for the bills when due, and to keep *Kendall & Co.* out of cash advances, paying them one-half per cent. commission on the acceptances. This arrangement came into operation in 1871, and bills to a large amount were from time to time accepted under it. Messrs. *Wilson & McLay* got into difficulties. Four actions were brought against them by *Kendall & Co.* in respect of acceptances which *Kendall & Co.* had been obliged to meet. Two of these actions (the second and third) covered the whole debt which was the subject of the present action. The second was commenced on the 12th of June, 1874, and, by arrangement, judgment in it was signed in September, 1874. The third action was commenced in July, 1874, and judgment, for want of a plea, was signed in August, 1874. At that time, as it was alleged on behalf of the Plaintiffs, *Kendall & Co.* were ignorant of the fact that *Hamilton* was in any way interested in the matters which were the subject of the dealings between themselves and *Wilson & Co.* (1). No plea in abatement was put in. The amounts awarded by the judgments had never been received by *Kendall & Co.*, the judgments remaining entirely unsatisfied.

On the 1st of April, 1875, a sequestration in bankruptcy according to the Scotch form issued against *Wilson & Co.*, and on the 5th of April, 1875, Messrs *Grahames* of *Glasgow*, appointed as trustees under this sequestration, wrote to *Kendall & Co.* as to proofs of their claims on the bankrupt estate, and the letter contained this sentence, "You will see that the claim has been made

(1) In the Court below Lord Justice *Cotton*, in delivering the judgment of the Court of Appeal, said, "In April, 1874, after the claim which is the subject of this action had arisen, there was a meeting between the Plaintiffs and the partners in the firm of *Wilson, McLay & Co.*, at which the Defendant was present, and in our opinion the fair result of the evidence is that the Plaintiffs then learned that the Defendant had an interest in the contract sued on."

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out by us on the assumption that it belongs entirely to the old firm, and that you have no farther security than the iron held. This latter we mention, as *Wilson & Co.* said something about having told you about a Mr. *Hamilton* being partly liable for their debt." In sending back the affidavits which this letter had required to sustain their claim against the estate of *Wilson & Co.*, Messrs. *Kendall* wrote, "In regard to Mr. *Hamilton*, we never knew him in the transactions at all, and were only aware that he had an interest in the ventures of iron long after the whole of the debt was incurred."

Messrs. *Kendall* issued a writ against Mr. *Hamilton* from the Common Pleas on the 5th of July, 1877, and in their statement of claim alleged that *Hamilton* was, at all material times, a partner in the firm of *Wilson & Co.*, and as such party to the transactions with that firm, and they claimed a sum of above £38,000 as due on the bills, and gave credit for a sum of £858 as a dividend recovered from the sequestered estate of *Wilson & McLey*.

Hamilton put in his statement of defence in August, 1877, denying that he was a partner; alleged that *Kendall & Co.* had always looked to *Wilson & Co.* and never to him; and that *Kendall & Co.* had proved against the estate of the bankrupts, and had in their affidavits on such occasion deposed that *Wilson & Co.* were solely liable in respect of the matters set forth in such affidavits.

There were originally two questions of fact raised for the consideration of the Court, first, whether *Hamilton* had been a partner in the iron transactions of *Wilson & Co.*, and, next, whether *Kendall & Co.*, after knowledge of the connection between these parties, had not concluded themselves by electing to proceed against *Wilson & Co.* alone. As to the first, the arrangements between the parties were contained in two letters, the first of which was dated the 20th of January, 1871, and was addressed by *Wilson & Co.* to *Hamilton*. It contained these words: "Referring to our different conversations in this matter, the arrangement come to between us is this: that all purchases of old rails, cast or malleable, scrap iron, wheels, tyres, axles, and other old material in *India*, shall be on the joint account of you and us, and that the profit or loss shall be shared equally between us. The financial arrangements shall be managed entirely by us. . . . That a state-

ment of each transaction shall be made up, including all commissions, discounts, and other charges, and the net result shewn, which, as before stated, shall be equally divided," The proportions of this division were altered in a letter of the 16th of November, 1864, in consequence of Mr. *McLay* himself going to *India*, but no other alteration took place. As to the second matter, the knowledge by *Kendall & Co.* of the relations between the parties, *Hamilton* alleged that on or about the 7th of April, 1874, after all the causes of action in the statement of claim had arisen, an interview of the parties took place at which *Kendall* and one of his partners (Mr. *Pryor*), *Hamilton*, *Wilson*, and *McLay* were all present, and *Kendall* and *Pryor* then had full notice that *Hamilton* was interested with *Wilson*, *McLay*, *& Co.* in the shipments of iron. This statement of "full notice" was rather one of inference than fact, and was denied by *Kendall & Co.* The date of this interview preceded that of the actions by *Kendall & Co.* against *Wilson & Co.*, and also preceded the date of the Scotch sequestration under which *Kendall & Co.* had proved their claim and had received a dividend.

The case came on for trial before Mr. Baron *Huddleston* (without a jury), and his Lordship, on a full consideration of the case, gave judgment in favour of the Plaintiffs. On appeal Lord Justice *Cotton* delivered the judgment of Lords Justices *Brett*, *Thesiger*, and himself, reversing the judgment of the Court below (1). This appeal was then brought.

The case was twice argued. First, before Lord *Hatherley*, Lord *Penzance*, Lord *Blackburn*, and Lord *Gordon*. Secondly, before the Lord Chancellor (Earl *Cairns*), Lord *Hatherley*, Lord *Penzance*, Lord *O'Hagan*, Lord *Selborne*, Lord *Blackburn*, and Lord *Gordon*.

Mr. *Kay*, Q.C., Mr. *Watkin Williams*, Q.C., and Mr. *C. S. Bowen*, were for the Appellants.

Mr. *Benjamin*, Q.C., and Mr. *Rigby*, appeared for the Respondent.

For the Appellants it was contended that this action against *Hamilton* was properly maintainable. He had a partnership inte-

(1) 3 C. P. D. 403.

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rest in the particular transactions on which arose the claim of the Appellants. The letter of the 20th of January, 1871, explained the nature of the partnership, and the other letters shewed it to have been adopted and acted on. He was, therefore, liable in respect of that interest. Even at Law he would, in point of principle, be liable, and the only difficulty that could arise there, would be one occasioned by the mere form of proceeding at Law, which supposed that the same contract could not be the subject of two different suits, especially after the original cause of action had been declared and adopted as the ground of a judgment, and judgment on it had been entered up. It was supposed that the contract had then ceased to exist as a contract, and had become *res judicata*. But now, the Courts of Law had an equitable as well as a legal jurisdiction, and under the *Judicature Act*, 1873 (1), the technical objection against a proceeding like the present no longer existed, but the rules of Equity would in a case like this prevail. *Lane* v. *Williams* (2) shewed that where one partner signed a note as for both, the money might be recovered in Equity against the estate of the other partner. A similar result was come to in *Bishop* v. *Church* (3). And in *Gray* v. *Chiswell* (4) Lord *Eldon* treated it as settled that Equity would consider a partnership debt of the kind as several as well as joint; and with regard to the proof in bankruptcy, which does not allow joint creditors to come on the separate estate till the separate creditors have been satisfied, he observed, "It is extremely difficult to say upon what the rule in bankruptcy is founded." There is here no question of conflict between joint and separate estates, so that that difficulty does not arise. In *Jacomb* v. *Harwood* (5) it was held that judgment in an action against a surviving partner was no extinguishment, in Equity, of the partnership debt. But even at Law, in *Rice* v. *Shute* (6), Lord *Mansfield*, taking a distinction between torts and contracts, said,

(1) 36 & 37 Vict. c. 66, s. 24; and s. 25, sub-s. 11: "Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of Equity and the rules of the Common Law, with reference to the same matter, the rules of Equity shall prevail."

(2) 2 Vern. 277–292.

(3) 2 Ves. Sen. 100, 371.

(4) 9 Ves. 118.

(5) 2 Ves. Sen. 265.

(6) 5 Burr. 2611.

that the principle of Law was that "all contracts with partners are joint and several. Every partner is liable to pay the whole." In *Daniel* v. *Cross* (1) the estate of a deceased partner in a bank was held liable upon notes issued before his death, which appeared to have been called in, but had been reissued by his surviving partners. In *Ex parte Kendall* (2) Lord *Eldon*, after referring to *Hoare* v. *Contencin* (3) and to the rule of Equity, though he expressed his "surprise that a Court of Equity should have interposed to enlarge the effect of a legal contract" (4) did not suggest a doubt of the existence of the equitable rule. In *Devaynes* v. *Noble* (5) Sir *W. Grant* speaks of this equitable rule as very distinctly established. *Sumner* v. *Powell* (6) does not detract from that, for it merely declares that every joint covenant is not to be considered joint and several when the obligation exists only by virtue of the covenant, as in that case itself, where there was no previous debt, and nothing relating to actual third parties, the indenture being a mere arrangement between the parties to it, the extent of the obligation could consequently only be measured by the words of the covenant itself. That the ordinary liability of a partner in a trading firm is in Equity several as well as joint, was shewn in *The Liverpool Bank* v. *Walker* (7), where two executors carried on their testator's business, and in that character, as executors, accepted a bill, and it was held that the ordinary equitable liability on the bill attached on the estate of one of those who died in the lifetime of the other. In *Wilkinson* v. *Henderson* (8) the whole question was elaborately argued, and the Master of the Rolls began his judgment by declaring (9) that "all the authorities establish that in the consideration of a Court of Equity a partnership debt is several as well as joint;" and in *Beresford* v. *Browning* (10) the present Master of the Rolls, observing upon Sir *W. Grant's* remarks in *Devaynes* v. *Noble, Sleech's Case*, as to what might have been the origin of the rule, says (11) that wheresoever the doctrine came from, "the law has never been

(1) 3 Ves. Jun. 277.
(2) 17 Ves. 514.
(3) 1 Bro. C. C. 27.
(4) 11 Ves. at p. 525.
(5) *Sleech's Case*, 1 Mer. 563.
(6) 2 Mer. 30; T. & R. 423.
(7) 4 De G. & J. 24.
(8) 1 My. & K. 582.
(9) Ibid. 588.
(10) Law Rep. 20 Eq. 564.
(11) Law Rep. 20 Eq. at p. 573.

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questioned that it extends to all mercantile partnerships." The doctrine that no arrangement between the partners could affect their joint and several liability to creditors was distinctly affirmed when *Beresford* v. *Browning* went to the Court of Appeal (1). The form of the decree in such a case is given in *Seton* on Decrees (2). In *Lodge* v. *Prichard* (3) the testator had been a partner in a trading firm. Shortly after his death the surviving partner became bankrupt, a dividend was paid upon the joint debts, and the joint estate was fully administered, but after that a decree was made for the administration of the testator's estate, the joint creditors being only prevented from proving for the residue of their claims until after the testator's separate creditors had been paid. The right was admitted, though the rights of other persons were treated as having a preference. In the case of *Robinson's Executors* (4) the holders of shares in a joint stock company were held individually responsible to the creditors of the company. The rule which was acted on in all these cases had been distinctly laid down in *Thomas* v. *Frazer* (5) and *Burn* v. *Burn* (6) as to bonds given by partners, on the face of which the liability, as expressed in words, appeared to be joint only, but in which the liability was held to be also several.

There was no such thing as election here. The plea in abatement being abolished, the Legislature had intended by the application of the rules of Equity to such a case to secure to Plaintiffs the advantages which they would otherwise have obtained from that plea. In *Ex parte Higgins* (7) the judgment proceeded expressly on the ground that there had been election in that case. Here there was none. The Plaintiffs had done all that they could to recover the debt. They had no information when they sued *Wilson & McLay* that the Defendant was really a partner with them in this particular business, and no doctrine of election could be applied to a person who was not fully acquainted with the facts. *King* v. *Hoare* (8) was not properly applicable here, for there could be no doubt that the credit there was given to the two

(1) 1 Ch. D. 30.
(2) Pages 237, 239.
(3) 1 De G. J. & S. 610.
(4) 6 D. M. & G. 572.
(5) 3 Ves. 399.
(6) Ibid. 573.
(7) 3 De G. & J. 33; 27 L. J. (Bankcy.) 27.
(8) 13 M. & W. 494.

parties together, it was so alleged in the plea, and not only not denied—but, as the case was heard upon a demurrer to the plea, it was in fact admitted. That case was, in truth, one of wilful election with a full knowledge of the facts, and could not, therefore, be made to apply to a case like the present, where the arrangement between the three parties was entirely secret, and where until quite recently, and after the first action had been determined, no one was acquainted with its real nature. It was also to be observed that in *Ex parte Waterfall* (1) Vice-Chancellor *Knight-Bruce* suggested a doubt as to the authority of the decision in *King* v. *Hoare* (2). But without disputing its authority, it was clearly distinguishable from the present case.

For the Respondent it was contended that there was no such universal rule of Equity as would make the Respondent here liable. In Equity itself there was no rule that a joint contract was also to be treated as a several contract, though in the case of the death of one of the joint contractors, Equity allowed a remedy against the assets of the deceased. The rule of Law was, however, positive, and must apply to this case, and, that being so, the action could not be maintained against Mr. *Hamilton*. The contract had been made with *Wilson & McLay* alone, and they alone were trusted by the Appellants. The *Judicature Act* did not affect the established rule of Law and give a new right of action where none had before existed, but only gave an opportunity to assert an existing and acknowledged right where the forms of law might not be sufficient for that purpose. Here the forms of law had been amply sufficient to secure to the Appellants a legal judgment against their real debtors, and there was no conflict of Law and Equity, nor, indeed, such difference between them as could give a pretence for calling in aid the provisions of the *Judicature Act* to complete a defective proceeding at Law. The original contract liabilities had by the judgment been ascertained and declared—and, according to the rule clearly declared in *Brown* v. *Wootton* (3), and expressly adopted in *King* v. *Hoare* (2), the cause of action being

(1) 4 De G. & Sm. 199; S. C. *nom. Ex parte Jones*, 20 L. J. (Bankcy.) 5.

(2) 13 M. & W. 494.

(3) Cro. Jac. 73; Yelv. 67; Moor. 762.

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converted into *rem judicatam* could not be made the subject of a new action.

The principle on which this case must be decided was fully stated in *King* v. *Hoare* (1) and that case had never been impeached. There the action was brought against one of the parties known to be jointly interested, and judgment recovered, and though there had been no satisfaction of the judgment, the fact that judgment had been obtained, and a mere cause of action had been so converted into *rem judicatam* against one party, was held a bar to an action against the other party.

Mr. *Kay* replied, and contended that the decision in *King* v. *Hoare* did not lay down a principle which affected this case, but depended entirely on the forms of pleading and on the particular circumstances which existed there. Besides which, Equity always treated partnership debts as several as well as joint, and the rule of Equity must now, by force of the special provision in the *Judicature Act*, govern the decision of this case, so that even, if in itself an authority, *King* v. *Hoare* had ceased to be applicable.

THE LORD CHANCELLOR (Earl *Cairns*):—

My Lords, in the arguments in this case at your Lordships' Bar, as well as in the arguments and judgments in the Court below, the facts of the case were presented in a form which may be thus described: It was said that the Appellants were creditors to whom a debt was due from *Wilson, McLay*, and the Respondent *Hamilton;* that this debt was in the nature of a partnership debt due from the three jointly; that the Appellants brought an action for the debt against *Wilson & McLay* alone; that at the time they brought the action they were not aware that the debt was contracted by *Hamilton* jointly with *Wilson & McLay;* that *Wilson & McLay* did not plead in abatement, or otherwise object to the non-joinder of *Hamilton;* that judgment was obtained by the Appellants against *Wilson & McLay*, but this judgment, by reason of the insolvency of *Wilson & McLay*, did not lead to satisfaction of the debt; that the Appellants afterwards discovering the interest of *Hamilton*, brought an action against him for the

(1) 13 M. & W. 494.

debt, which is the action out of which the present appeal arises; that thereupon two questions arose for the determination of the Court—first, was the judgment recovered against *Wilson & McLay*, even without satisfaction, a bar, according to the principle hitherto prevailing in Courts of Common Law, to the action against *Hamilton?* and, secondly, was there not a doctrine in Courts of Equity that all partnership debts were several as well as joint, and, if so, ought not that doctrine to be applied just as if the debt in this case had been the several debt of *Hamilton*, so as to prevent him setting up the judgment against *Wilson & McLay* as an impediment to the Appellants suing him, *Hamilton?*

I will presently endeavour to express to your Lordships what my opinion would be upon these questions if they were really the questions to be determined in the case. But I must first suggest to your Lordships that the facts of the case, when properly considered, would seem to me to make it doubtful whether the questions which I have mentioned really arise in the case, and whether the case does not fall to be determined upon considerations somewhat different.

Between 1870 and 1874 the Appellants were merchants carrying on business in *London*. *Wilson & McLay* were carrying on business in *Glasgow* and *London* under the firm of *Wilson, McLay, & Co.* *Wilson & McLay* undertook certain speculative shipments of old iron, and the Appellants agreed to provide, through the acceptance and discounting of bills of exchange, the money necessary to carry on these speculations. In point of fact, although the Appellants did not know it at the time, the Respondent *Hamilton* was interested in these shipments. *Hamilton* had agreed that the shipments should be for the joint benefit of himself, *Wilson & McLay*, and that the financial arrangements should be managed by *Wilson & McLay*. *Wilson & McLay* were, therefore, in reality the agents authorized to borrow money for undisclosed principals, who were *Wilson, McLay*, and *Hamilton*. The persons advancing the money would have the right, on becoming aware of the interest of *Hamilton*, to sue *Wilson, McLay*, and *Hamilton*, as the principals on the contract, and if they sued *Hamilton* alone he would have a right to plead in abatement the non-joinder of *Wilson & McLay*. But the persons advancing

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the money would also have the right to treat *Wilson & McLay* as the principals, and to sue them alone; and *Wilson & McLay* would have no right in such an action to plead in abatement, or otherwise object to the non-joinder of *Hamilton*.

In the present case, the transactions to which I have referred resulted in a large sum of money being due to the Appellants. For this sum they brought an action against *Wilson & McLay*. This they were clearly entitled to do, whether they knew or did not know of the interest of *Hamilton*. They might, it is true, at any time before judgment, have discontinued the action against *Wilson & McLay*, and have brought a fresh action against *Wilson, McLay*, and *Hamilton*, as principals, but, if they did not do so, *Wilson & McLay* could not in any way have objected to the non-joinder of *Hamilton*, or have contended that they were not the persons, and the only persons, to be sued. In this state of things the action went on, and resulted, as I have already said, in a judgment against *Wilson & McLay*.

Now, I take it to be clear that, where an agent contracts in his own name for an undisclosed principal, the person with whom he contracts may sue the agent, or he may sue the principal, but if he sues the agent and recovers judgment, he cannot afterwards sue the principal, even although the judgment does not result in satisfaction of the debt. If any authority for this proposition is needed, the case of *Priestley* v. *Fernie* (1) may be mentioned. But the reasons why this must be the case are, I think, obvious. It would be clearly contrary to every principle of justice that the creditor who had seen and known and dealt with and given credit to the agent, should be driven to sue the principal if he does not wish to sue him, and, on the other hand, it would be equally contrary to justice that the creditor on discovering the principal, who really has had the benefit of the loan, should be prevented suing him if he wishes to do so. But it would be no less contrary to justice that the creditor should be able to sue first the agent and then the principal, when there was no contract, and when it was never the intention of any of the parties that he should do so. Again, if an action were brought and judgment recovered against the agent, he, the agent, would have a right of action for

(1) 3 H. & C. 977.

indemnity against his principal, while, if the principal were liable also to be sued, he would be vexed with a double action. Farther than this, if actions could be brought and judgments recovered, first against the agent and afterwards against the principal, you would have two judgments in existence for the same debt or cause of action; they might not necessarily be for the same amounts, and there might be recoveries had, or liens and charges created, by means of both, and there would be no mode, upon the face of the judgments, or by any means short of a fresh proceeding, of shewing that the two judgments were really for the same debt or cause of action; and that satisfaction of one was, or would be, satisfaction of both. In the present case I think that when the Appellants sued *Wilson & McLay*, and obtained judgment against them, they adopted a course which was clearly within their power, and to which *Wilson & McLay* could have made no opposition, and that, having taken this course, they exhausted their right of action, not necessarily by reason of any election between two courses open to them, which would imply that, in order to an election, the fact of both courses being open was known, but because the right of action which they pursued could not, after judgment obtained, co-exist with a right of action on the same facts against another person. If *Wilson & McLay* had been the agents, and *Hamilton* alone the undisclosed principal, the case could hardly have admitted of a doubt; and I think it makes no difference that *Wilson & McLay* were the agents and the undisclosed principals were *Wilson*, *McLay*, and *Hamilton*.

My Lords, if the view which I have taken of the facts and of the law applicable to them is correct it is not necessary to look at *Wilson*, *McLay*, and *Hamilton* in the position of co-contractors; but, looking at them in this light, I must say that the case of *King* v. *Hoare* (1) appears to me to have been decided on satisfactory grounds. It is the right of persons jointly liable to pay a debt to insist on being sued together. If then there are three persons so liable, and the creditor sues two of them, and those two make no objection, the creditor may recover judgment against those two. But should he afterwards bring a farther action against the third, that third may justly contend that the three

(1) 13 M. & W. 494.

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should be sued together. It is no answer to him to say that the other two were first sued and made no objection, for the objection is the objection of the third, and not of the other two. Nor is it any answer to him to say that whatever he pays on the judgment against himself he may have allowed in account with the others, because he may fairly require, with a view to his right of account or contribution, to have the identity and the amount of the debt constituted and declared in one and the same judgment with his co-contractors. If, therefore, when the third is sued, and requires that the other two should be joined as parties, the creditor has to admit that he cannot join the other two because he has already recovered a judgment against them in the same cause of action, this is equivalent to saying that he has disabled himself from suing the third in the way in which the third has a right to be sued.

It has been suggested that even assuming the case of *King* v. *Hoare* (1) to have been rightly decided, the law as laid down in that case has been altered by the Judicature Acts and by the abolition of the plea in abatement. I am unable to agree to this suggestion. I cannot think that the Judicature Acts have changed what was formerly a joint right of action into a right of bringing several and separate actions. And although the form of objecting, by means of a plea in abatement, to the non-joinder of a Defendant who ought to be included in the action, is abolished, yet I conceive that the application to have the person so omitted included as a Defendant ought to be granted or refused, on the same principles on which a plea in abatement would have succeeded or failed. In this particular case, indeed, I observe the judgment against *Wilson & McLay* was obtained before the *Judicature Act* came into operation: and if this judgment then became pleadable in bar (according to *King* v. *Hoare* (1)) by *Hamilton* in answer to an action against himself, I cannot see how this defence is taken away from him by the *Judicature Act* subsequently coming into operation.

If, then, this was the attitude of defence which *Hamilton* was entitled to take up in opposition to the present action, it does not appear to me that any difference is made by the doctrines of the Court of Equity with regard to partnership debts. There is no

(1) 13 M. & W. 494.

doubt that in many cases and text-books we find the expression that a partnership debt is in Equity joint and several. This, however, is only a compendious expression, which must be interpreted with reference to what were the functions of the Court of Equity as to partnership debts. The only interposition of a Court of Equity with regard to partnership debts, took place in the administration of the assets, either of the partnership or of a deceased member of the partnership. Where a member of the partnership died, the debts became in the eye of a Court of Law the debts of the survivors; but the survivors, on the other hand, in a Court of Equity, had the right, as against the estate of a deceased partner, to say that his representatives should not withdraw any part of the partnership property until all the debts were paid or provided for. If, therefore, a Court of Equity was administering the assets of a deceased partner, it would, in order to clear his estate, ascertain his liabilities to the partnership, and for this purpose would ascertain the debts due from the co-partnership at his death. From this the transition was easy to giving the creditors of the partnership a direct right, and not merely an indirect right, through the surviving partners, to come for payment against the assets of the deceased partner; and from this again the transition was easy to the expression which said that partnership debts, in the eye of a Court of Equity, were joint and several—not thereby meaning that a Court of Equity altered or changed a legal contract, but merely that the Court, in order, before distributing assets, to administer all the equities existing with regard to them, would go behind the legal doctrine that a partnership debt survived as a claim against the surviving partners only, and would give the creditor the benefit of the equity which the surviving partners might have insisted on.

My Lords, this is so clearly expressed by Lord *Eldon* in the case of *Ex parte Williams* (1), that I will take leave to read his expressions, which appear to me to render unnecessary any comment on the numerous authorities which were cited on this head at your Lordships' Bar. Lord *Eldon* says (2), "Among partners clear equities subsist, amounting to something like lien. The property is joint; the debts and credits are jointly due. They have equities to discharge each of them from liability, and then to

(1) 11 Ves. 3. (2) 11 Ves. at p. 5.

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divide the surplus according to their proportions. . . . But, while they remain solvent, and the partnership is going on, the creditor has no equity against the effects of the partnership. He may bring an action against the partners and get judgment, and may execute his judgment against the effects of the partnership. But, when he has got them into his hands, he has then by force of the execution, as the fruit of the judgment, clearly not in respect of any interest he had in the partnership effects, while he was a mere creditor, not seeking to substantiate or create an interest by suit. There are various ways of dissolving a partnership—effluxion of time, the death of one partner, the bankruptcy of one, which operates like death, or, as in this instance, a dry, naked agreement that the partnership shall be dissolved. In no one of those cases can it be said that to all intents and purposes the partnership is dissolved, for the connection still remains until the affairs are wound up. The representative of a deceased partner, or the assignees of a bankrupt partner, are not strictly partners with the survivor or the solvent partner, but still, in either of those cases, that community of interest remains, that is necessary, until the affairs are wound up; and that requires, that what was partnership property before shall continue for the purpose of a distribution, not as the rights of the creditors, but as the rights of the partners themselves require; and it is through the operation of administering the equities, as between the partners themselves, that the creditors have that opportunity; as in the case of death it is the equity of the deceased partner, that enables the creditors to bring forward the distribution." I imagine that the words "bring forward" are probably an inaccurate report; but it obviously means to insist upon the distribution.

If, therefore, this case is to be looked at as a case in which judgment has been recovered for a partnership debt against two out of three co-partners, it appears to me that, on the principle of *King* v. *Hoare* (1), the judgment would be a bar at law to a subsequent action against the third co-partner; and I know of no principle on which a Court of Equity could hold the debt to be several for the purpose of preventing such a result.

In any view of the case, therefore, I am of opinion that the

(1) 13 M. & W. 494.

judgment of the Court of Appeal was correct, and I have to move your Lordships to dismiss the appeal with costs.

LORD HATHERLEY :—

My Lords, I am of the same opinion as to the result which must be arrived at in this case. The question here is, whether or not a person who was unknown to the Plaintiffs at the time they were advancing their money, as being one of the borrowers of the money, and who was acting through the agency of Messrs. *Wilson & McLay*, is now, in consequence of anything which has taken place under the *Judicature Act* (for that was the principle of the argument at the Bar) placed in a different position from that in which he would have been if that Act had not been passed. If it had not been passed, I think his position would have been sufficiently clear.

Now if *King* v. *Hoare* (1) is to subsist as an authority—and having stood so long I apprehend it would be difficult to shake it as an authority now—then the Plaintiffs in this case having sued two of the partners and having omitted to sue the other partner, of whose existence they were unconscious (as I think the whole of the evidence goes to shew), having proceeded against two partners and obtained a judgment against them, their co-contractor could not, according to *King* v. *Hoare* (1), be sued, because the debt, which was a simple contract debt in the first instance, contracted by the firm, had passed into *rem judicatam* under the operation of the judgment which had been obtained against the two.

My, Lords, I would therefore, for the purpose of considering this case, which has been discussed by my noble and learned friend the Lord Chancellor upon the general question of agency, prefer to consider it as a simple question of partnership, in which a debt has been contracted; and I assume for the present purpose that it was originally joint, in order that we may see what remedies were at the time open to the Plaintiffs, independently of death. This case not being like the numerous cases cited, in which the Court of Chancery held a partnership deed to be joint as well as several, (there being no death in this case), it is obvious

(1) 13 M. & W. 494.

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that such remedy as the Plaintiffs then had was entirely at Law. The Court of Chancery could offer no assistance in the case where there was a legal contract, unless there was found in that contract some element which made it inequitable that the debtor should be allowed to set up the defence now relied on. In the case of a person setting up a term of years at law the Court of Chancery can interfere by injunction, and prevent his doing so, but that case would be very different. If the defence in *King* v. *Hoare* (1) be, as has been supposed by some, and as was urged and alleged at your Lordships' Bar, contrary to what one may call the equitable engagement between the parties, then I apprehend the proper course would have been to take some proceedings for preventing the Defendant from setting up such a defence as was effectually set up in *King* v. *Hoare* (1), on the ground that it was an inequitable defence, and that a judgment obtained against two of the co-contractors in the absence of the third, should prove no bar to a subsequent suit against the third. But not only was no such attempt made in this case, but in no case that I ever heard of, in Equity, has there been any injunction applied for, much less obtained, with regard to that particular position of the parties.

What happened in *King* v. *Hoare* (1) was, that one of the parties died, and then an application was made that the equity which has been administered from time to time in Chancery with regard to the assets of a deceased partner, and the distribution of those assets among the several creditors, might be made available on account of that death. But then that was met by the averment that the death had happened since the suit, and that it could not interfere with the previous suit, but that that must meet with the common fate of such suits.

That, my Lords, being the position of the parties at Common Law, what was their position in Equity? Numerous cases were cited to your Lordships to shew that the Equity Courts recognised a partnership debt as being, in its nature and essence, a joint and several debt. I have had an opportunity of seeing the opinion about to be delivered by one of your Lordships, which goes into more detail than I think it is necessary for me to go into at this moment; but I can say with confidence, having gone through the

(1) 13 M. & W. 494.

cases cited before you, that no case will be found in which any such assertion has been made with reference to the nature of the debt except *sub modo*—that is to say, except in those cases where the remedy has been given against the assets of the deceased partner, upon the grounds which are stated very distinctly by Lord *Eldon* in the case of *Ex parte Williams* (1), cited to your Lordships by my noble and learned friend on the woolsack.

These cases are numerous, but although they are so numerous there is no single case existing in which an attempt was made to administer that particular species of equity which would induce the Court to turn a contract at law joint, into a joint and several contract. In all these cases there has been a necessary administration of assets for the purpose of clearing the assets as between the partners themselves.

My Lords, that being so, there is, I apprehend, no mode in which the relief now asked in this action, and asked under the new procedure, could be obtained. A Court combining Law and Equity under the *Judicature Act* is authorized to adopt the procedure of a Court of Equity, and the Court of Equity is compelled to avail itself of the powers given to it as a Court of Law. There is nothing in those circumstances which can, as it appears to me, assist the Plaintiff at all, if he had not at the time of the passing of the Act any remedy which could be given him by Law, or any remedy which could be given him by Equity. It does not seem to me possible that two powers combined, neither of which could effect anything of itself, would have a more efficacious result than when taken separately, except in this sense, that if there was really a remedy in the one Court which was not given by the other, you can understand that the assistance of the one might give a more complete, perfect, and effectual remedy than the other separately. In this case before the passing of the *Judicature Act*, nothing could have been recovered at all, in respect of legal debt, in a Court of Equity, and a Court of Law having once given judgment on a contract, had no power to authorize any procedure against a third person as a party to that contract.

Now, my Lords, during the argument in the Court below, the remark was quoted as having been made by a very eminent

(1) 11 Ves. 3, at p. 5.

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Judge, that this rule which was adopted in *King* v. *Hoare* (1) was entirely a rule of procedure. I do not take that view of the case, because I apprehend that when Mr. *Hamilton* contracted together with others to pay the debt, in contracting jointly he gave rights to those others. Suppose the debt was enforced against one of those who were jointly liable for the debt, rights would be acquired by the one who paid the whole debt against those who had not taken part in that payment. One great object in bringing all the parties concerned before the Court is this: in Equity it is always considered essential that if there be a suit upon a debt for which two parties are jointly liable, you must have both those parties present in order to enforce the payment of that debt. The reason is, that the person who has entered into this joint contract has a right to have the whole matter settled at once. Otherwise you might bring an action against the co-contractor, and having established your case against the co-contractor, having established it, we will say, for £1000 as principal moneys and interest between the two, you might then proceed to bring a totally distinct action against the other, and obtain from him payment of a larger or a smaller sum as the case might be. But you would obtain a judgment which would settle nothing as between the two co-contractors; it would settle nothing as regarded the debt due, by way of suretyship, from one co-contractor against the other contractor. Each of the co-contractors has a right to be sued and to have the matter settled at once, instead of its being settled piecemeal. He ought not to be compelled to submit to another suit, which would indeed be equally disadvantageous to the Plaintiff himself, because of course the Defendant in that suit would naturally have a right to insist upon having the debt proved against him, if at all, to the extent to which it had been proved against his co-contractors.

When it is said here that the co-contractors do not mean the whole of the three partners to the suit, Mr. *Hamilton* has nothing to say to that whatever—he remains ignorant—there is nothing to shew that he necessarily was aware of what was coming upon him with regard to the question in dispute. He would have no opportunity of defending that other action when it was brought

(1) 13 M. & W. 494.

against the co-contractors, and it would not lie with him to raise a plea in abatement, if it ever could be raised. Those who ought, if they intended to have set up that plea, to insist upon it in the first instance, were his co-contractors, and if the Plaintiff himself, being unaware of the existence of this partner, did not introduce him in the first instance, he must take the consequence of losing the advantage which might have been obtained from having Mr. *Hamilton* as one of the co-contractors. That advantage could not be retained by the Plaintiffs, and ought not in justice to be retained by them after they had attained the result they were aiming at, namely, the judgment against the two co-contractors.

It has been observed during the course of the argument here, that, in truth, as to the abstract justice of this case, there is a pretty even balance between the two, because it is only by the fortunate accident of Mr. *Hamilton* being a solvent party that the Plaintiff finds that he has a solvent co-contractor, of whom he was unaware. He did not contract with Mr. *Hamilton* except as an undisclosed person, and this undisclosed person with whom he entered into no engagement that he knew of, turns out afterwards to be liberated in consequence of the Plaintiff not having taken steps to ascertain who were the co-contracting parties when he was bringing the action. The Plaintiff having advanced the money, looked to *Wilson & McLay* as the people who should pay, but he has since discovered that there is another person whom he thinks he may sue. I think it would not be conducive to the advancement of abstract justice that he should have an opportunity of suing this person whom he did not sue when he sued the two co-contractors. My Lords, I see nothing I confess in the case of *King* v. *Hoare* (1) which would lead one to doubt that this case was one, as the law stood, legally decided; and if there be any consequential injustice arising from any particular circumstances to persons similarly situated to Messrs. *King & Hoare,* the evil would preponderate over any advantage there might be in requiring all co-contractors to be made parties liable. If there is any injustice in it, it can only be remedied by the Legislature, should it think fit to afford this remedy. At this distance of time, after so much reliance has been placed, from time to time in other cases,

(1) 13 M. & W. 494.

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upon the law as laid down in *King* v. *Hoare* (1), it cannot be now altered by a decision of your Lordships' House, the ordinary practice of which would require that which has been so long established as the law amongst mercantile men to be continued until it has been reversed by Act of Parliament.

My Lords, I am therefore of opinion that the resolution you are asked to come to sustaining the decision of the Court below and dismissing the appeal is a correct conclusion, and that no substantial injustice will be done in that way.

LORD PENZANCE:—

My Lords, the Plaintiff in this action has advanced a large sum of money to the Defendant in conjunction with two other persons. The Defendant has had the full advantage and benefit of the Plaintiff's money to the extent of his share in the joint adventure. In every aspect of the case, therefore, the Plaintiff has no doubt acquired a legal, equitable, and moral right against the Defendant to repayment; nor has this been, even in argument, denied. The defence set up against this just claim rests upon this, and upon this alone, that in accordance with a certain rule of procedure established some five-and-twenty years ago by the single case of *King* v. *Hoare* (1), which has never yet had the sanction of a Court of Appeal, the Plaintiff, by bringing a previous action against two out of the three partners, has wholly lost his remedy against the Defendant, who is the third. I will presently examine the technical grounds upon which this rule is based, but before doing so I cannot forbear asking myself how far such a rule is consistent with justice. What justice, then, is there in saying that when three persons are, all and each, individually liable to pay a debt, an action and judgment (still unsatisfied) against two of them should extinguish the liability of the third? The most that can be said is that by two actions being brought instead of one, additional costs have been incurred. The joint contractors or partners may reasonably insist that the Plaintiff should not pursue his remedies against them in a vexatious manner, and if two actions are, without good reason, brought where one would have sufficed, it may well be that to the extent of the extra costs thereby involved the loss should

(1) 13 M. & W. 494.

be borne by the Plaintiff. But this is a very different penalty from the extinction of the Defendant's liability, which may be the same thing as the loss of the Plaintiff's debt altogether. Even this consideration, however, as to unnecessary costs, applies only to a case in which the Plaintiff, with his eyes open, has chosen to sue some of the partners first and the others afterwards. It cannot apply to a case like the present, in which the two first sued concealed the fact that the third was a partner in the adventure, a fact of which the Plaintiff was himself ignorant, and, being ignorant, could not possibly have sued the whole three together. This circumstance removes at once all blame from the Plaintiff, and with it all semblance of justice from the defence now made. So entirely is this the case that no argument has been ever offered at your Lordships' Bar, to shew that the Defendant has been prejudiced by the Plaintiff's conduct, or that anything has taken place which ought, in reason or justice, to render the Defendant less liable to pay this debt now than he was at first. The defence is, and has been rested throughout, wholly and solely upon the technical rule to which I have adverted, and the authority of the case by which that rule was laid down.

In this state of things I confess I am unwilling that your Lordships should confer the high sanction of this, the ultimate Court of Appeal, upon a rule of procedure which, without affecting to assert any just rights on the part of the Defendant, denies the aid of the law to enforce those of the Plaintiff. Procedure is but the machinery of the law after all—the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to subserve.

With these observations I proceed to consider the case of *King* v. *Hoare* (1), upon which the present case is rested. The proposition that a cause of action which has never been before the Court at all has become "*res judicata*" is a startling one. The present Plaintiff has never before impleaded the present Defendant—has never made any previous attempt to enforce the liability which he now asserts, and yet is met at the threshold of

(1) 13 M. & W 494.

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his suit with the plea that the matter between him and the Defendant has already become "*res judicata.*"

The doctrine of law regarding merger is perfectly intelligible. Where a security of one kind or nature has been superseded by a security of a higher kind or nature, it is reasonable to insist that the party seeking redress should rest upon the latter, and not fall back on the former. In like manner, when that which was originally only a right of action has been advanced into a judgment of a Court of Record, the judgment is a bar to an action brought on the original cause of action. The reasons for this result are given by Baron *Parke* in *King* v. *Hoare* (1). He says: "The judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained so far as it can be at that stage; and it would be useless and vexatious to subject the Defendant to another suit for the purpose of attaining the same result. Hence the legal maxim, '*Transit in rem judicatam ;*' the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher."

This reason is satisfactory and conclusive upon the assumption that the cause of action attempted to be sued upon is the same cause of action with that upon which a judgment has already been obtained. But is it so in a case like the present? If a man deliver goods or lend money to two partners, the promise which the law implies is a joint promise. The effect of such a promise, as distinguished from a joint and several promise, is that in case of death the debt is enforcible only against the survivor. If the farther effect of such a joint promise in point of law were that it could not constitute a cause of action against one only of the two contractors, then the reasoning in the case of *King* v. *Hoare* (2) would be unquestionable, for there could be but one cause of action resulting from it, and that a joint one, and the cause of action having been advanced to a judgment, could not support a second action. But this is not what the cases establish the effect of a joint promise to be. If a man contracting, as above supposed, with two partners, likes to bring an action against one only, and to allege against him a promise by him alone, (taking no notice

(1) 13 M. & W. 494, at p. 504. (2) 13 M. & W. 494.

whatever of the other partner or of his promise,) he has a *good cause of action*, and one which cannot be defeated by the Defendant's proving that the promise was not made by him alone, but by him jointly with another. Now, if a joint promise by two were a thing so different in point of law in its quality and character, from a promise by one only, that it could not be held to include within it a promise by each; and if it did not in point of law give rise to a separate cause of action against one, the Defendant in the case above supposed ought to be able to defeat the Plaintiff's claim by shewing that the promise sued upon was not the promise made, and that the promise which was in reality made was a joint one only, and as such did not give rise to the separate claim. This was exactly what the Defendant attempted to do in the case of *Rice* v. *Shute* (1), but it was adjudged against him. In that case the Judge who tried the cause, considered that a declaration upon a separate promise of the Defendant, was not supported by proof of a joint promise by the Defendant and another—that there was in consequence a variance between the allegation and the proof—and he nonsuited the Plaintiff. This nonsuit the Court set aside, and the language of Lord *Mansfield* is so instructive that I quote it (2): "To be sure, a distinction is to be found in the books between torts and assumpsits; that in torts all the trespassers need not be made parties, but in actions upon contract every party must be made a Defendant. Many nonsuits, much vexation and great hindrance to justice, have been occasioned by this distinction. It must have been introduced originally from the semblance of convenience, that there might be one judgment against all who were liable to the Plaintiff's demand. But experience shews that convenience, as well as justice, lies the other way. All contracts with partners are joint and several; every partner is liable to pay the whole. In what proportion the others should contribute, is a matter merely among themselves." And again, "It is cruel to turn a creditor round and make him pay the whole costs of a nonsuit in favour of the Defendant, who is certainly liable to pay his whole demand, and who is not injured by another partner's not being made Defendant; because, what he pays he must have credit for in his account with the partnership." He then goes on

(1) 5 Burr. 2611. (2) 5 Burr. 2613.

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to say that he had consulted the other Judges, and that "they were all of opinion that the Defendant ought to plead in abatement; he must then say who the partners are. If the Defendant does not take advantage of it at the beginning of the suit and plead it in abatement, it is a waiver of the objection. He ought not to be permitted to lie by, and put the Plaintiff to the delay and expense of a trial, and then set up a plea not founded on the merits of the cause, but on the form of proceeding." "No injustice is done to the Defendant by allowing the Plaintiff to recover, but great injustice is done to the Plaintiff by allowing the nonsuit to stand." It is clear, therefore, that, although the Defendant in such a case may, if he like, compel the Plaintiff to discontinue his action and bring a fresh one against both, by means of a plea in abatement, there is yet a good cause of action against him which will sustain the verdict and judgment if that course be not followed.

This, therefore, might happen: the Plaintiff upon a joint promise might bring and carry forward two actions *pari passu*, one against each of the joint contractors, and provided that neither of them chooses to plead an abatement (which they may have no object in doing, as it does not get rid of their liability) these actions may go on to judgment, and in neither of them, though the fact of the promise being joint only, and not joint and several, were to appear on the record, by bill of exceptions or otherwise, could the judgment be arrested or declared erroneous. Now if two judgments against two different Defendants can be supported upon one joint promise, does not that shew that there are in reality two causes of action involved in the breach of one joint promise; and if so, the principle upon which *King* v. *Hoare* (1) was decided, resting as it does upon the assertion that the joint promise gives rise to one cause of action and one only, cannot be sustained. The true position of the creditor would appear to be this; that he has a cause of action against either of his debtors separately or both together, subject to a plea in abatement? Now what is a plea in abatement? It is not a plea which affirms that the Plaintiff has no cause of action, or that, having had one, it has been barred. It affirms only that the Plaintiff is bound to pursue

(1) 13 M. & W. 494.

his remedy in another form of proceeding, and an essential quality of it is that it should shew that such form of proceeding is available to him. I will quote Mr. *Chitty's* description of it (1): "Whenever the subject-matter of the plea or defence is, that the Plaintiff cannot maintain any action at any time whether present or future in respect of the supposed cause of action, it may, and usually must, be pleaded in bar; but matter which merely defeats the present proceeding, and does not shew that the Plaintiff is for ever concluded, should in general be pleaded in abatement (from the French *abattre*). The criterion or leading distinction between a plea in abatement and a plea in bar is, that the former must not only point out the Plaintiff's error, but must shew him how it may be corrected, and furnish him with materials for avoiding the same mistake in another suit in regard to the same cause of action, or in technical language 'must give the Plaintiff a better writ.'"

By such a plea, therefore, either of the two joint contractors being sued alone, might insist upon the Plaintiff bringing his action against both. But it is obvious that this right can only be exercised, on the part of both, by him who is first sued. If one of the two allows his liability to be enforced in a separate action, it is too late afterwards for the other, if sued, to plead in abatement, for he cannot give the Plaintiff a better writ.

The conduct of his co-contractor in permitting the Plaintiff to go on to judgment against him alone, has rendered a joint action against the two impossible. The Plaintiff has no longer a joint promise upon which to sue the two; the promise of one having passed into *res judicata*. The technical grounds, therefore, upon which the decision in *King* v. *Hoare* (2) is based appear to me to be insufficient and unsatisfactory.

When the Judges of the Queen's Bench, in the case of *Rice* v. *Shute* (3), under the guidance of Lord *Mansfield*, determined that a joint promise of several might give rise to a separate action against one only, contrary to the rule of law previously established that it could not do so (a rule which he said had led to "many nonsuits, much vexation, and great hindrance to justice,") they

(1) 1 *Chitty* on Pleading, 7th Ed. p. 462.
(2) 13 M. & W. 494.
(3) 5 Burr. 2611.

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destroyed the basis upon which the Court in *King* v. *Hoare* (1) built the decision, namely, that the second action was brought for the same cause of action as the first.

Passing from mere technical views, and regarding this rule of procedure in the light of convenience and fitness to promote the ends of justice, there is still less to be said for it. For it is to be observed, that the rule is unbending and indiscriminate. No exception is permissible under it for a case in which one or more of several partners may be abroad, in which case the Plaintiff must either wait to bring his action until they are all within the jurisdiction, or bring his action at once, at the cost of losing the responsibility of those who are out of the country. Nor is any exception possible for a case like the present; in which the Plaintiff could not possibly sue all the partners at once, being ignorant that the Defendant was one of them. In the first case the rule impedes and obstructs justice, and in the second, denies it altogether.

No doubt rules of procedure must be framed on general considerations, though they may work hardship in individual cases, and when a rule is once established, those who practise the law must be assumed to be aware of it, and frame their proceedings accordingly; but then the rule ought to be such that it can be acted on, and a rule that on a joint promise all partners must be sued jointly cannot be acted upon by one who does not know the existence of some of the parties liable, and so becomes a mere trap and pitfall which the creditor has no means of escaping.

But I must now advert to the *Judicature Act*. Assuming that the case of *King* v. *Hoare* was well decided in the then state of the law—a time when the defeat of just rights by non-joinder or misjoinder of parties, defects of pleading, and the non-observance of technical rules, was a matter of daily occurrence—a farther and most important question, in the present action, appears to me to be this: whether since the passing of the *Judicature Act*, and in a proceeding taken under that Act, such a defence as the present can be maintained. Every provision and every line of that Act prove it to have been based upon the broad principle of making forms, rules, and modes of procedure subordinate to the prime and

(1) 13 M. & W. 494.

paramount object of reaching the justice of the case, and I should be surprised to find that a doctrine so wholly foreign to its spirit and objects as that upheld by the case of *King* v. *Hoare* (1) had survived the sweeping changes in procedure which the *Judicature Act* introduced. I think I can shew that it has not done so.

That Act abolished all the old forms of action; it abolished all the old technical forms of procedure, and established a new procedure for the enforcement indiscriminately of both legal and equitable rights, which is independent of all the old rules of law on that subject. Particularly it did away with all objections and defences arising out of the misjoinder or non-joinder of parties, either Plaintiff or Defendant. Since that Act no such thing as a plea in abatement is possible. The non-joinder of any party under any circumstances has ceased to be an answer, objection, or defence to the action. In such a case the action goes on, and "the Court or a Judge may, on such terms as appear to be just, order that the name of any party who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, shall be added." This is the language of the Rule 9 on procedure in the first schedule to the Act of 1873.

Now these provisions appear to me to have entirely altered the rights of joint contractors in respect of procedure. They have no longer any absolute right to insist that they should be sued together or not at all. The creditor may bring and pursue his action against one or more of them, and if the Defendants desire that others should be joined, they must apply to a Judge, who will hear what is to be said on both sides and decide that additional parties shall, or shall not, be joined according to the requirements of justice, and not according to the election of the Defendants, or any imperative rule that all who jointly contracted must be jointly sued.

The joint contractor having thus lost the right (for it was a right, and an absolute one, though only a right of procedure) to be sued only in conjunction with his co-contractor, he can no longer be heard to maintain either that his co-contractor must be

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sued with him, or that, it being impossible so to sue him by reason of his having been sued already, he is himself discharged. The necessary connection in matters of procedure which the law before the Act had established (as Lord *Mansfield* said "for convenience") between the joint contractors, and had enforced by the plea in abatement, is now by the Act severed and put an end to.

When the plea in abatement was swept away the legal right of a joint contractor to have the other joint contractor joined in any action brought upon the joint promise was swept away too, and the creditor became entitled to sue the parties severally, subject no longer to the will of the Defendant, but to the discretion of the Court exercised for the furtherance of justice.

And this again cuts the ground from under the doctrine of *King* v. *Hoare* (1), in which case Baron *Parke* laid great stress upon the argument that if after the first action the Defendant could not plead in abatement, "he would be deprived of a right by the act of the Plaintiff without his privity or concurrence in suing and obtaining judgment against the other."

Upon the whole, then, it seems to me that the right of persons making a joint promise to be sued jointly, first broken in upon by Lord *Mansfield* in *Rice* v. *Shute* (2), when he allowed an action to be maintained against one only of several joint contractors, was finally put an end to by the *Judicature Act* when the right to plead in abatement was withdrawn from them; and that the question properly arising in this case may be shortly dealt with as follows: The Plaintiff sues for a debt which the Defendant, originally at least, must be held to have owed him. The Defendant answers that the debt was due from him jointly with others, and not otherwise, that the Plaintiff's only right is to sue him jointly with the others—that he cannot sue the others now, having already done so, and that he has thus lost the only right of action he ever had. The answer to this is simple. Since the *Judicature Act* it is not true that the Plaintiff's only right is to sue the Defendant jointly with the others.

I will not occupy your Lordships time farther on the proper view to be taken in regard to the authorities in Equity. I willingly adopt the opinions of the Lord Chancellor and others of

(1) 13 M. & W. 494. (2) 5 Burr. 2611.

your Lordships much more competent than I am to read those decisions aright, but for the reasons which I have given I think that the judgment of the Court below ought to be reversed, and the Plaintiff have judgment for his debt in this action.

LORD O'HAGAN:—

My Lords, I have had the opportunity of reading and considering the opinion which has been delivered by my noble and learned friend on the woolsack in this case; and I concur generally with the views he has expressed and the reasons by which he has sustained them.

There is no question of fact in the case; and in the argument at the Bar it seemed to be conceded that unless the doctrines of a Court of Equity intervene to establish that the Defendant *Hamilton* and his co-partners *M'Lay* and *Wilson* may be dealt with as joint and several debtors, and not as joint debtors only, the appeal must be dismissed.

The Plaintiffs obtained judgment against *Wilson & M'Lay*, whom they sued as their sole debtors, in ignorance that *Hamilton* was a partner, and, therefore, responsible for the payment of the debt; and it was asserted that the judgment so obtained was, at Law, a bar to the suit against him, on the ground that the original cause of action had thereby passed "*in rem judicatam*," and could not be the foundation of any further proceeding. Unless your Lordships are prepared to overrule the decision in the case of *King* v. *Hoare* (1), the proposition cannot be disputed. That decision is clear upon the point, and it has been followed in a number of cases, and generally recognised by Courts of Law in accordance with the statement of Mr. Baron *Parke*, that "the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher;" and that the judgment bars it, "because it is thereby reduced to a certainty, and the object of the suit attained so far as it can be at that stage, and it would be useless and vexatious to subject the Defendant to another suit for the purpose of attaining the same result."

I do not deem it necessary to go further into a consideration of the grounds of that decision. They are stated in the judgment of

(1) 13 M. & W. 494.

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the Court of Exchequer, and have been sufficiently explained by my noble and learned friends. On those grounds it seems to me sustainable, as well as on a view of the right which a joint debtor has, to be sued, with others, upon a promise made by him jointly with them, to whom his relations may be injuriously affected, if, a judgment having been obtained for the same cause of action, he cannot have the advantage which might otherwise have accrued to him for the purposes of contribution and account, and the establishment of joint responsibility.

The question is one of procedure, and the rule may operate harshly in conceivable circumstances. But it has been justified, from the desirableness of preventing repeated litigation for the same cause, and maintaining the claim of the debtor to have any such benefit as may accrue to him if, his liability being joint, he is required to answer jointly.

In this case the merits are certainly not with the Defendant; but it is to be noted that the Plaintiffs have had the opportunity of enforcing their demand against the persons with whom they meant to contract, and on whose credit only they made the sale and delivery of their goods. And I am afraid that rules of procedure (adopted because they are convenient and effective generally for assisting in the rightful administration of justice), from the imperfection of human tribunals will sometimes, in particular instances, be found to defeat equitable claims. But, be the merits as they may, I do not see sufficient reason for overruling a well-considered judgment, sustained as it is by such considerations and such a series of authorities, and not assailed at the Bar, so far as I remember, by any argument or suggestion on behalf of the Appellants. As regards the operation of the principle recognised by the case of *King* v. *Hoare* (1), it does not seem to me,—reserving the consideration of the effect to be given to the doctrine of equity on the joint and several liability of contractors,—that the *Judicature Act* meddles with that principle. The procedure is changed. The plea in abatement is abolished. The Court is required to intervene where the parties to the action were formerly obliged to plead; but it does not seem to follow that the change in the machinery of enforcement alters the rights to be enforced, or takes

(1) 13 M. & W. 494.

from the joint contractor any privilege which formerly belonged to him. It may be guarded in a different way, but I do not think it is abrogated by any express proviso or any necessary implication. It is clear, however, that the doctrine of *King* v. *Hoare* (1) is not applicable, if the debt sued for be joint and several; and the real contention of the Appellants has been that, although at Law the contract in the case was joint, inasmuch as Equity would have dealt with it, before the passing of the Judicature Acts, as joint and several, the Appellants are entitled, under the 24th section of the Act of 1873, to the same relief as would have been given to them by the Court of Chancery in a suit or proceeding instituted there.

Now, in the first place, in ordinary cases, and unless, in exceptional circumstances, a deviation from ordinary principles of construction has been allowed, a contract is construed in the same way by a Court of Equity and by a Court of Law; and it lies upon those who seek such a deviation to produce authority which may clearly justify it. The presumption is the other way. Here the contract at Law was confessedly joint. The burthen of shewing that, in Equity, it was joint and several, lies upon the Appellants.

It is conceded, that the precise contention which grounds the argument has never been sustained, in the exact circumstances to which it is now applied. In another state of facts, and as between parties having other relations than those of the Plaintiffs and Defendants, Courts of Equity have, not without difficulty and hesitation, dealt with a contract, joint at Law, as joint and several. But if the distinction so established in a particular case, was meant to apply not merely to it but generally to all cases, it seems scarcely conceivable that the point should not have heretofore arisen, for it must have often been the interest of suitors to avoid, by a recourse to Equity, the embarrassments created by legal strictness as to joint contracts and their incidents.

A great many cases have been cited to your Lordships in which *dicta* of learned Judges are embodied, and successive text-books seem to represent, without limit or qualification, that the debts of co-partners are in Equity joint and several. And if those *dicta* are to be taken without reference to the subject matters to which

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they apply, they would undoubtedly countenance the contention of the Appellants. But, as has been made very clear by my noble and learned friends, they have been in fact applied merely in cases of the administration of the assets of partners who have died. In those cases only has effect been given to them—for the purpose apparently of making the administration more full and equitable than it could have been if the debt had been held good, without a provision for the proportional discharge of liabilities out of the estate of the deceased in reciprocity with its claims on the estate of the survivors. Lord Justice *James* explains succinctly the equitable rule as to partnership contracts: "So far as regards partners when there is in Equity no survivorship of property there is in Equity no survivorship of liability."

The reason of the rule, as far as it is ascertainable, has already been discussed. It is well explained in the passage from Lord *Eldon*, which has been cited by my noble and learned friend on the woolsack, and needs no farther exposition. It is notable that Lord *Eldon* himself (*Ex parte Kendall* (1)) expressed his surprise that "where parties think proper to enter into a joint instead of a joint and several contract, Courts of Equity have not left that to its fate as a joint contract." He admits the force of the authorities deciding "that there is a remedy against the assets of one deceased if the survivor cannot pay," but he admits it with apparent reluctance. He repeats, in the same case, referring to a doubt of Lord *Thurlow* upon the point, the expression of his own surprise "that a Court of Equity should have interposed to enlarge the effect of a legal contract." And, again, he carefully confines the enlargement as warranting only "resort to the assets of a deceased debtor" (2). I see no valid ground for extending it further, and no sufficient reason for holding, according to the contention of the Appellants, that, in Equity, all partnership contracts are, in all circumstances and for all purposes, joint and several. I think that Lord Justice *Cotton* correctly states the result of the cases; and that the effect of the judgment at Law against *Wilson & McLay* is not done away by any equitable principle.

I have not adverted to the peculiar view presented to this House

(1) 17 Ves. at p. 518. (2) 17 Ves. at p. 525.

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by my noble and learned friend on the woolsack. It has originated with him, and was not suggested or discussed in the course of the argument. The House could scarcely act upon it, as against the Appellants, without affording to their counsel the opportunity of considering, and, if possible, encountering it. I base my opinion, therefore, on the conclusions to which I have arrived with reference to the points mooted at the Bar. I shall only say that, at present, I am disposed to concur with the Lord Chancellor, although the same objection as to the evil of giving procedure the effect of defeating a fair demand would apply as much to the result of his opinion as to the decision in *King* v. *Hoare* (1).

On the whole, for the reasons I have given, I think the appeal must be dismissed.

LORD SELBORNE:—

My Lords, the argument of the Appellants was chiefly, if not wholly, founded upon the course of the Court of Chancery in the administration of the assets of a deceased person, who has been a partner in a trading firm, and upon the language held by several Judges of high authority with respect to the equitable position of partnership creditors.

If that language were found to be technically exact, when tested by the practice of Courts of Equity, upon all occasions when the rights of partnership creditors have come in question, it might (perhaps) be a sound conclusion that its principle ought to be extended to such a case as the present, though no precedent directly in point has been produced. But the fact is otherwise. If every debt of a trading partnership were regarded in Equity as, from its commencement, joint and several, in the proper sense of those words, there could be no reason why in bankruptcy, where equitable are regarded as much as legal rights, it should not have been treated in the same way as any other joint and several debt; nor why Lord *Eldon* should have made such a decree as he did in the case of *Gray* v. *Chiswell* (2). Nor do I think it possible that if, in Equity, a separate debt due from a creditor of a firm to one of the partners could be set off against the debt of the firm, there would not have been ample authority for that proposition.

(1) 13 M. & W. 494. (2) 9 Ves. 118.

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If no rule had been established in Equity, giving partnership creditors a remedy against the assets of a deceased partner, it would have seemed clear, on principle, that in all these cases, when there was no mistake to be rectified in any written instrument, the legal contract between the creditor and the debtors was the only contract, and that its construction must be the same in Equity as at Law.

I conclude, therefore, that those expressions of eminent Judges in which partnership debts have been spoken of as, in Equity, joint and several, were not meant by them to be understood in the proper and technical sense of those words; and that they cannot safely be used to establish any rule or principle extending beyond those limits within which Courts of Equity have hitherto given, to creditors of a partnership, remedies which they could not have obtained at Law.

It is undoubtedly true that the remedy which a Court of Equity gives to a partnership creditor, in the administration of the assets of a deceased partner, has the effect of preserving to him the liability of an estate which, by the survivorship of the co-debtor or co-debtors, has at Law become exonerated. Great Judges, such as Lord *Eldon* and Lord *Thurlow*, have felt difficulty in referring this course of practice to any very clear or satisfactory principle. It has been said to depend upon, or to arise out of, the adjustment of the rights and liabilities of the deceased and the surviving partners *inter se;* but this explanation does not, to my mind, remedy the difficulty, because, upon that principle, it would seem that the creditors ought to be limited, in each particular case, by the extent of the rightful claims of the surviving partners upon the deceased partner, and to be wholly excluded if the state of the accounts between them were such as to make it just to leave the whole liability where the law had cast it, viz., upon the surviving partners. The actual course of administration (subject to the distinction between a personal action and proof against assets) has been to give the creditor as large and unqualified a remedy against the estate of the deceased partner, as he would have had by action at law in his lifetime. There is (as it seems to me) only one really consistent explanation of this course of practice, when taken in connection with the rule in bankruptcy, and with

the general principles of Law and Equity, viz., that derived from the doctrine "*jus accrescendi inter mercatores locum non habet.*" As in several other well-known classes of cases (of which mortgages and security bonds, with penalties, may be taken as examples), equity controls the operation of a legal contract so as to give effect to the purposes and objects to which it was meant to be subsidiary, so in these partnership cases it controls, *inter mercatores*, the legal effect of survivorship. If that is the principle of the rule, it is one which arises upon death only. The partnership is dissolved by death; but in Equity it is taken as still subsisting, for every purpose of liquidation, just as if it had been dissolved *inter vivos*, and the creditors are taken as still creditors of that partnership. What was before joint thus becomes several, by the dissolution, and by the exclusion in Equity of the survivorship which takes effect in Law; and although, when this rule was first established, it might well have been doubted whether it did not give creditors rights for which they had never contracted, there could be no doubt, after it had once become a settled rule, that the rights resulting from it were necessarily implied in all subsequent onerous contracts by copartners. For this purpose (and, as it seems to me, for this purpose only, and only by the operation of death) all such contracts may be described, as in Equity, joint and several.

My conclusion is that in the present case there is no equity upon which the Appellants can be entitled to be relieved from the legal effect of the judgment obtained by them against *Wilson, McLay, & Co.*, if, (as the equitable argument assumes,) that judgment had the effect of extinguishing, in the lifetime of all the partners, the legal liability of the Respondent as a partner for the debt previously due from the partnership of which he was a member. There is no question here of *jus accrescendi;* the question relates simply to the constitution of the Appellants' debt. Before the action it was a joint debt; but by the result of the action (if the decision in *King* v. *Hoare* (1) is right, and is applicable to this case), it became the separate debt of *Wilson, McLay, & Co.* only. If the joint debt, for which alone the Respondent was ever liable, was merged and extinguished at Law by this judgment (on

(1) 13 M. & W. 494.

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which the Respondent is clearly not liable, either at Law or in Equity), it seems to me to be impossible that Equity should, on that ground, raise or imply against him, out of the original contract, a separate liability to the Appellants from which he is free at Law, whatever may be the rights, by way of contribution, indemnity, or otherwise, which *Wilson, McLay, & Co.* may possess against him in respect of this judgment.

Upon the legal question, I understand it to be the opinion of all your Lordships, that a second action cannot be maintained upon a cause of action which has once passed *in rem judicatam:* and that this principle is not affected by any of the changes of procedure introduced by the Judicature Acts. What I understand to be the view of my noble and learned friend opposite (Lord *Penzance*), is, that the cause of action, in this case, is *not the same* with that on which the judgment against *Wilson, McLay, & Co.*, was obtained. Apart from authority, I should myself have thought it clear that, if the contract was joint only, the cause of action *was* the same. The rule established in *Rice* v. *Shute* (1), on whatever principle it may have been founded, was (I suppose) applicable to *all* cases of actions *against* one (or less than all) of several joint contractors; and not only to partnership cases. Unless, therefore, that rule justifies the conclusion that *all* joint contracts are in law several, as well as joint, until survivorship takes place by the death of one of the contractors, I cannot see how it tends to prove that there are, in such cases, more causes of action than one upon the same contract. If that conclusion were sound, it is by no means clear to my mind, that even a plea in abatement ought to have been allowed: nor can I imagine any reason why the same principle should not equally hold in the converse case, of an action brought by one of several persons *with* whom, jointly, a contract has been made; in which case (whatever may have been the ground of the distinction) the rule has been that a plea in abatement was not necessary; but that it was sufficient to make the defence of joint contract available, if the facts came out in evidence.

I, therefore, agree with my noble and learned friend on the woolsack, that the appeal in this case ought to be dismissed; but I have preferred to rest my own judgment upon that view of the

(1) 5 Burr. 2611.

facts of the case which was taken by the counsel on both sides and in the Courts below.

LORD BLACKBURN:—

My Lords, in this case the Plaintiffs entered into transactions with the firm of *Wilson, McLay, & Co.*, then consisting of two persons—*Matthew Wilson* and *Joseph Corrie Shutters McLay*. They, at the request of that firm, and in consequence of contracts made with that firm, accepted bills and entered into other transactions, the result of which was that a large sum was owing to the Plaintiffs for which they might have maintained an action for money lent against those two persons.

The Plaintiffs did not, at the time when they entered into the contracts which resulted in this cause of action, know that any other person was interested in the contracts; they dealt with *Wilson & McLay*, and with them alone, and gave credit to them alone. But afterwards (in the view which I take of the case, it is immaterial when) the Plaintiffs discovered that the Defendant *Hamilton* had agreed to share with *Wilson & McLay* in certain adventures which would require the advance of money, and that "the financial arrangements should be managed" by *Wilson & McLay*.

This amounted to an authority to *Wilson & McLay* to borrow money for the joint account of *Wilson, McLay, & Hamilton*, who were the undisclosed principals of *Wilson & McLay* in the contract of loan. And it is, I think, now firmly established as law that a person entering into a contract with one to whom, and to whom alone he trusted, may, on discovering that the contractor really had a principal, though he neither trusted to him nor gave credit to him, nor even knew of his existence, charge that principal, unless something has happened to prevent his doing so. He is not bound to do so. In the present case *Wilson & McLay* could not, if sued before the Judicature Acts, have pleaded in abatement the non-joinder of *Hamilton;* nor if *Wilson & McLay* had sued the Plaintiffs could they have resisted a set-off of the money lent to them, on the ground that in borrowing it they were agents for a concealed principal.

I will first consider how this case would have stood at Law before

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the Judicature Acts, and then inquire what difference these Acts make. I take it, for the reasons I have given, to be clear that, under such circumstances as exist in the present case, the now Plaintiffs might have maintained an action for money lent against *Hamilton*, on the ground that he, jointly with *Wilson & McLay*, being undisclosed principals to *Wilson & McLay*, was, as such, liable to the Plaintiffs. But the facts are such that *Hamilton* could have proved a plea that the contract, on which he was sued, was made by the Plaintiffs with the Defendant, and *Wilson & McLay*, jointly, and not with the Defendant alone, and that the Plaintiffs, before action, had recovered judgment against *Wilson & McLay* for the same loan upon the same contract. And then the question would have arisen, whether a judgment recovered against one or more of several joint contractors was (without satisfaction) a bar to an action against another joint contractor sued alone. The decision in *King* v. *Hoare* (1) was that it is a bar.

I have already said that, in my view of the matter, it was immaterial when the Plaintiffs first discovered that they had a right to have this recourse against *Hamilton*, which they had never bargained for, and which was to them a piece of pure good luck. If the principle on which *King* v. *Hoare* (1) was decided had been that, by suing some he had elected to take them as his debtors to the exclusion of those whom he had not joined in the action, it would be material; for I assent to the argument that there cannot be election until there is knowledge of the right to elect. But *King* v. *Hoare* (1) proceeded on the ground that the judgment being for the same cause of action, that cause of action was gone. *Transivit in rem judicatam*, which was a bar, partly on positive decision, and partly on the ground of public policy, that there should be an end of litigation, and that there should not be a vexatious succession of suits for the same cause of action. The basis of the judgment was that an action against one on a joint contract was an action on the same cause of action as that in an action against another of the joint contractors, or in an action against all the joint contractors on the same contract.

From very early times it was the law that a contract was an entire thing, and that, therefore, all who were parties to the con-

(1) 13 M. & W. 494.

tract must, if alive, join as Plaintiffs and must be joined as Defendants. If this was not done there must be a plea in abatement (Com. Dig. Abatement, E. 12, F. 8). That very learned lawyer cites 7 Hen. 4, 6, and 20 Hen. 6, 11, as authorities for this, and probably earlier authorities might be found, but I think it unnecessary to search for them, as it has never, as far as I know, been doubted that the Defendant might plead the non-joinder of his joint contractors in abatement, and in that way compel the Plaintiff to join as Defendants all who were parties to the joint contract and were still alive. But there was long a controversy as to whether the plea in abatement was the only way in which the objection could be raised. If on the evidence it was proved that the contract was joint, it was thought that there was a variance between the proof of a joint contract with the parties to the action, and some one not a party to the action and still alive, and the allegation in the declaration which, it was thought, must be taken to be an allegation of a contract between the parties to the action and no others, and consequently that there should be a nonsuit or verdict for the Defendant on the ground of variance. This, it has now been settled, is the law in cases where the objection is the non-joinder of a Plaintiff; and consequently the non-joinder of a co-contractor as Plaintiff was never in modern times pleaded in abatement. And it was long thought by many that the same course was open to a Defendant. Such was the decision of Lord *Holt* and the Court of King's Bench in *Boson* v. *Sandford* (1). My Lords, I need hardly point out that if this had been still followed as law, it would have made it clear that the cause of action against the one was the same as that against all; or rather that there was no cause of action at all against the one alone, and never could be judgment against one alone; and so the point could never have risen. But it was established by a series of cases, which may be found collected in Serjeant *Williams'* note to *Cabell* v. *Vaughan* (2), that though all the joint contractors must be joined as co-Defendants, the only way of taking advantage of the non-joinder was by a plea in abatement. The first case, in which I find this decided, was *Rice* v. *Shute* (3). The last in which I find it controverted,

(1) 2 Salk. 440.
(2) 1 Wms. Saund. 290a.
(3) 5 Burr. 2611.

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though unsuccessfully, was *Evans* v. *Lewis* (1), in 1794. But though the mode of enforcing the joinder of all was thus cut down, it still remained the law that all ought to be joined. And consequently I cannot doubt that the Judges in *King* v. *Hoare* (2) were accurate in holding that the two actions were upon the same cause of action. I cannot agree in what seems to be the opinion of the noble and learned Lord on my left (Lord *Penzance*) that the *Judicature Act* has taken away the right of the joint contractor to have the other joint contractors joined as Defendants, or made it a mere matter of discretion in the Court to permit it. With great deference I think that the right remains, though the mode of enforcing it is changed.

I do not think the defence a meritorious one; but I think in the present case there is no great hardship. The Plaintiffs had a right of recourse against *Hamilton*, for which they never bargained; but they did nothing inequitable in taking advantage of that which the law gave them. They have destroyed that remedy by taking a judgment against persons who turn out to be insolvent. I do not see that *Hamilton* does anything inequitable in taking advantage of the defence which the law gives him. The Plaintiffs got a right by operation of law, without any merits of their own, by what, as far as regards them, was pure good luck. They have lost it by what was no fault of theirs, but was, as far as they were concerned, pure bad luck. If the Plaintiffs were willing to take advantage of their good luck against the Defendant, it seems no hardship that he should take advantage of their bad luck against them.

But in such a case as *King* v. *Hoare* (2), where the Plaintiff had contracted with the provisional committee of a company, and consequently was very uncertain how many were joint contractors, it did operate harshly. He dared not join many in the first action, for, as the law then stood, if he failed as to any one he failed as to all; and it does seem hard that a judgment obtained under such circumstances against one should be without satisfaction a bar as to all the others. This hardship is very much removed by

(1) 1 Wms. Saund. 291 (d); Bayley on Bills, 381. See also Lord *Ellenborough* in *Mountstephen* v. *Brooke*, 1 B. & Ald. 226.

(2) 13 M. & W. 494.

the provisions of the existing law, by which the Plaintiff recovers judgment against those whom he proves to be his debtors, though he has joined others as Defendants; he has only to pay the costs of those improperly joined. But I think that the hardness of the law, even if it exist, is a reason for altering it, not for refusing to act upon it; and I think no doubt has ever been expressed, unless perhaps in *Ex parte Waterfall* (1), that *King* v. *Hoare* (2) does truly state the law as it existed before the Judicature Acts, and it was not doubted in the Courts below, or I think seriously questioned at the Bar, that it did so.

But since the *Judicature Act*, 1873, s. 24, Law and Equity are to be concurrently administered. And therefore if before the passing of those Acts the Plaintiffs could have sued in Equity on these facts, or if they could have successfully applied for an injunction to prevent the Defendant from pleading this defence, they may raise the same point in this suit in the Common Pleas Division. But the Judicature Acts do not create any equity applicable to this case which did not exist before. They only enable the Court to administer the equities already existing without the delay and expense formerly required.

On the first argument at your Lordships' Bar, Mr. *Rigby*, in a very excellent argument, convinced me that in cases of joint contracts there was no difference between Law and Equity, except in the single case of the death of one of the parties to a joint contract, where the contract was such that the maxim *inter mercatores jus accrescendi locum non habet* applied; but I was diffident of my opinion on a question of such pure, and I might say, technical equity; and was therefore very willing that the case should be re-argued.

I have now heard the opinion of the noble and learned Lords who are conversant with the proceedings in the Courts of Equity, and have no diffidence in saying that I am of the same opinion.

LORD GORDON:—

My Lords, this case is attended with very much difficulty, as is evinced by the difference of opinion expressed amongst your Lord-

(1) 4 De G. & Sm. 199. (2) 13 M. & W. 494.

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ships. I have given it my most careful consideration with the advantage I have derived from a perusal of the judgments which have been delivered by your Lordships, and I have come to the conclusion that the judgment of the Court of Appeal was right, and should be affirmed.

Judgment appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 28th July, 1879.

Solicitors for Appellants: *Freshfields & Williams.*
Solicitors for Respondent: *John W. Sykes.*

[HOUSE OF LORDS.]

CITY OF GLASGOW BANK IN LIQUIDATION.

H. L. (Sc.
1879
May 20.

THE five following cases, besides raising the general question as to the personal liability of trustees (which was decided adversely to trustees in the test case of *Muir* v. *City of Glasgow Bank*, *ante*, p. 337), also raised special grounds for the deletion of the trustees' names from the list of contributories.

1. CASE OF BELL, LANG, AND OTHERS.

Joint Stock Company—Unlimited Liability—Trustee—Companies Act, 1862, *ss.* 25, 78, 154, 196—*Transfer of Shares—Note of Assumption of New Trustees on Stock Ledger.*

In 1850 shares in the *City of Glasgow Bank*, which was a company registered, but not formed under the *Companies Act*, 1862, were transferred into the names of *A.* and three others as trustees and executors of a deceased truster. *A.* signed mandates to the bank authorizing the payment of dividends, sanctioned the purchase of additional bank stock, and signed the minutes of meetings of the trustees. On the voluntary winding-up of the company:—

Held, affirming the decision of the Court below, that *A.* was rightly put on the list of contributories.

Two surviving original trustees executed a deed assuming new trustees. Both new and old trustees passed an unanimous resolution to have stock standing in the names of the original trustees in the *City of Glasgow Bank* transferred into the names of the original and assumed trustees. A note of assumption, giving the names of all the assumed trustees, was made by the bank officials on the stock ledger following the account of the original trustees. All the trustees signed a minute of a meeting of the trustees, which stated that "Mr. *Lang* (one of them) tabled the scrip of the bank stock shewing that the same had been transferred into the names of all the trustees original and assumed as directed at the previous meeting." At the winding-up of the company the names of the assumed trustees were placed on the list of contributories. In a petition for rectification:—

Held, affirming the decision of the Court below, that the assumed trustees, except one, a female trustee, who had been a minor, and unmarried at the date of the resolution to transfer, were properly on the list of contributories; and declared as to the sometime minor, that her name should *in hoc statu* be removed from the list, without prejudice to the right of the liquidators to place thereon the names of her husband and herself in her right.

H. L. (Sc.)

1879

ALEXANDER MITCHELL'S CASE.

RUTHERFURD'S CASE.

2. ALEXANDER MITCHELL'S CASE.

Resignation of Office by Trustee after Stoppage of Company—24 & 25 *Vict. c.* 84, *s.* 1—30 & 31 *Vict. c.* 97, *s.* 10—*Companies Act*, 1862, *s.* 35.

If directors in the fair and *bonâ fide* exercise of their powers under the company's contract, as managers of the company, and in circumstances which make it a reasonable act of management, resolve not to record future transfers which may seriously affect and alter the liability of the partners, the resolution will be effectual, and the directors in declining to record the transfers cannot be held to be in default within the meaning of sect. 35 of the *Companies Act*, 1862.

Before the commencement of the winding-up, but after the stoppage, and after the publishing of a notice by the directors calling a special general meeting of the shareholders of the *City of Glasgow Bank*, for the purpose of passing a resolution to have the bank wound up by reason of its irretrievable insolvency; and after a resolution by the directors that they would not record any future transfers, one of four trustees whose names appeared as such on the bank register resigned his office of trusteeship under 24 & 25 Vict. c. 84, s. 1, with the consent of his co-trustees and the beneficiaries. A notarial copy of the resignation was sent the next day to the bank, but the directors refused to alter the register by affixing a note, or in any other way:—

Held, affirming the decision of the Court below, that the resignation was too late to exempt the trustee from personal liability.

Per EARL CAIRNS, L.C.:—The trustee's resignation of his trusteeship alone would not terminate his liability. He ceased to be a trustee; but it remained for him to terminate his liability in respect of the bank by a transfer, or something equivalent to a transfer, of his shares.

Per LORD SELBORNE:—After the issuing to the shareholders and the public of a circular calling a meeting, with a view to the necessary resolution for a voluntary winding-up, it is too late for any shareholder to part with his shares, either to the co-partnership itself or to any other person.

3. RUTHERFURD'S CASE.

Resignation of Trustees—Assuming of Beneficiaries as Trustees—Proceedings subsequent to notorious Insolvency of Company—Commencement of Winding-up.

In 1873 the names of four trustees were entered on the register of the *City of Glasgow Bank* as members. On the 2nd of October, 1878, the bank stopped payment. On the 5th of October the directors issued a summons convening a general meeting of the shareholders to pass a resolution for voluntary winding-up. On the 18th of October the original trustees assumed new trustees; resigned their office of trust; and executed a transfer. The directors refused to alter the register:—

Held, affirming the decision of the Court below, that the original trustees were personally liable, their resignation being too late.

Alexander Mitchell's Case (*post*, p. 567) followed.

4. BUCHAN'S CASE.

Trustee entered on Register as Executor—Acting as Shareholder for over twenty years—Personal Liability—30 & 31 *Vict. c.* 97, *s.* 10.

A truster under his settlement appointed three persons *A.*, *B.*, and *C.*, as his trustees, who were also to be his sole executors with his heritable and moveable estate, which included *City of Glasgow Bank* stock. *C.* died and the truster executed a codicil appointing *D.* as trustee, and with the same powers as *A.* and *B.* The truster having died in 1854, *A.*, *B.* and *D.* accepted the trust; were confirmed executors, and were entered on the bank register as executors for the stock. *D.* sometimes signed the dividend warrants as "trustee," and once as "sole surviving trustee and executor." The bank suspended payment on the 2nd of October, 1878, and on the 22nd of October *D.* resigned his office of trustee:—

Held, affirming the decision of the Court below, that *D.* was personally liable, on the ground that more than twenty years before he had authorized the stock to be transferred into his name, and had ever since acted as a shareholder.

Held, also, the resignation was of no effect to escape liability.

Per EARL CAIRNS, L.C.:—An executor whose testator has held shares in a joint stock company has generally one of two courses open to him. He may have the shares transferred into his own name, and become to all intents and purposes a partner in the company. He may, on the other hand, not wish to have the shares transferred into his name, and he ought in that case to have a reasonable time allowed him to sell the shares, and to produce a purchaser who will take a transfer of them.

In any case where the bank transfers the shares into the name of the truster's executor, this House would require to be satisfied that the transfer had been authorized by a distinct and intelligent request on the part of the executor.

Per LORD SELBORNE:—The case of trustees who take a transfer of shares in their names differs, in principle, from that of executors, who merely intimate their title as executors to a company, in order to claim and exercise the rights which belong to them as the legal representatives of their testator. . . . Trustees have not, in any proper sense of the word, a representative character, but executors have. . . . Having representative rights, it is impossible that they should not be entitled to produce the legal evidence of them to the company, for the purpose of having their title in some way recorded and recognised, without making themselves personally liable.

5. KER'S CASE.

Marriage Settlement—Transfer of Stock signed by Trustees—Dividend Warrant—Acting as Trustee—Non-intimation to Company of Resignation of Office.

In 1855 stock in the *City of Glasgow Bank* was transferred to trustees by an ante-nuptial contract of marriage. The law agent made a declaration of the contents of the deed, and notified it to the bank, who placed all the names of the trustees on the register of shareholders, as trustees. The marriage

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contract was not signed by any of the trustees; but they all subscribed subsequently a transfer of railway stock from the wife as executrix of one *Bogle* to themselves; and in this transfer they were described as "trustees nominated under and by virtue of the said ante-nuptial contract of marriage." In 1856 *A.*, one of the trustees, signed a dividend warrant; and shortly afterwards he left the neighbourhood. On the death of the husband in 1868, it being necessary to expede confirmation to his estate, *A.* refused to act any longer, and sent to the law agent a formal letter declining his office of trustee, it was accepted by the other trustees, but not regularly intimated to, or acted upon, by the bank. *A.'s* name remained on the register until the stoppage of the bank on the 2nd of October, 1878:—

Held, affirming the decision of the Court below, that *A.'s* name was rightly on the list of contributories, his acceptance of the trust being clearly established by his actings, extending over a long period of years; and that his resignation had not the effect of exempting him from personal liability.

BELL'S CASE.

1. CASE OF BELL, LANG, AND OTHERS.

Appeal from an interlocutor of the First Division of the Court of Session.

The Appellants are the original and assumed trustees under the settlement of the late *James Lang* of *Dumbarton*, who died in 1850. Mr. *Bell* is the sole surviving original trustee and executor. The other Appellants are Mrs. *Agnes Lang*, the widow, *John Lang*, *Margaret Lang*, Mrs. *Agnes Hamilton*, and Mrs. *Janet Hill*, the four children of the truster, who were assumed as new trustees by deed in 1865. The names of all the trustees stood on the stock ledger (1) of the *City of Glasgow Bank* at the date of its stoppage, the 2nd of October, 1878, as holders of £855 stock, and they have all been placed on the list of contributories. They claim to be removed from the list. Mr. *Bell* alleging that the stock was not properly transferred into his name. The other Appellants maintained that their names were placed on the register of shareholders without their authority; that the deed of assumption in their favour could not operate as a conveyance of the bank stock; and that the provisions of the deed of copartnership had not been complied with. Mrs. *Janet Hill*, who appeared with the consent of her husband, whose name was not placed with hers on the list of contributories, further relied on the additional grounds that at the time of the

(1) The register of shareholders kept in pursuance of the 25th section of the *Companies Act*, 1862.

alleged transfer she was a minor, and that now she was a married woman.

A minute of admissions was arranged by the parties, and, *inter alia*, contained the following facts (1):—

The late Mr. *James Lang* was owner of forty £10 shares of the capital stock, subsequently converted into £100 shares. On his death, in 1850, his trustees were confirmed executors, and the following entry was made in the transfer register of the company:

Peter M'Callum, hardware merchant, *Greenock*; *John Bell*, flesher, *Dumbarton*; *Archibald M'Callum*, writer, *Port-Glasgow*; and *James M'Callum*, residing in *Greenock*, as trustees and executors of the deceased *James Lang*, steamboat master, *Dumbarton*, the major number being a quorum.

On the 30th of July, 1851, Mr. *Bell*, with two other of the trustees, signed a mandate to the bank authorizing Mrs. *Lang*, the widow of the truster, to receive the dividends. In December, 1851, the trustees purchased, with trust funds, from Messrs. *Francis Orr & Sons* additional bank stock, making a total of £855 of stock held by the trustees, and Mr. *Bell* signed the transfers as accepting the stock. In February, 1852, Mr. *Bell* subscribed a letter to Mrs. *Lang* authorizing her to draw all future dividends; and subsequently he signed the minutes of the meetings of trustees. *Peter M'Callum* died in January, 1854, *James M'Callum* in November, 1861, and *Archibald M'Callum* in November, 1874, Mr. *Bell* being the only surviving original trustee.

As to the assumed trustees, the original trustees being in 1865 reduced to two in number, it was agreed that Mrs. *Lang* and her children should be assumed as new trustees, and on the 18th of May, 1865, a deed of assumption containing the following was executed by the two surviving trustees:

We do hereby dispose, assign, convey, and make over to and in favour of ourselves, the said *John Bell* and *Archibald M'Callum*, and the said Mrs. *Agnes Meikle M'Callum* or *Lang*, *John Lang*, *Margaret Lang*, *Agnes Lang*, and *Janet Lang*, and the acceptors and acceptor, survivors and survivor of us and them, as trustees for the ends specified in the said trust disposition and settlement (Mr. *James Lang's*) &c., all and sundry lands and heritages, goods, gear, debts, sums of money, and in general the whole of the foresaid trust estate and effects of every description and denomination.

(1) The clauses of the articles of copartnership are given *in extenso* in *Muir's Case*, *ante*, pp. 340–344.

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The following minute in the sederunt book of the trust was signed by all the trustees, both original surviving, and assumed:

Greenock, May 18th, 1865.

At a meeting of the trustees, held this day at No. 12, *Union Street*, there were present Messrs. *John Bell* and *Archibald M'Callum*. Mr. *M'Callum* laid before the meeting deed of assumption, nominating and assuming Mrs. *Lang*, Mr. *John Lang*, and Misses *Margaret*, *Agnes*, and *Janet Lang* to be trustees along with the said *John Bell* and *Archibald M'Callum*, in the management of the trust estate, and the said Mrs. *Lang*, *John Lang*, *Margaret*, *Agnes*, and *Janet Lang*, being called in, severally accepted, and by their subscription hereto do hereby severally accept of the office of trustee accordingly. The said deed of assumption was directed to be engrossed in the sederunt book.

(Signed) *John Bell*, *Agnes M. Lang*, *Archd. M'Callum*, *Margaret Park Lang*, *John Lang*, *Agnes M'C. Lang*, *Janet M. Lang*.

This deed of assumption was engrossed on the sederunt book, and was found amongst the trust papers. In 1871 another deed of assumption was executed, and recorded almost identical in terms with the one of 1865, which seems to have been used as a draft.

On the 17th of April, 1867, there was another meeting of the trustees original and assumed, and a minute signed by them all set forth:

The meeting taking into consideration that the whole of the stock held by the trustees stands in the name of the original trustees, several of whom are now dead, it was unanimously agreed that the stock be transferred to the surviving original trustees and the assumed trustees, and Mr. *Lang* (who acted as the agent for the trust) was instructed to have this done forthwith.

Signed thus:—*Archd. M'Callum*, *John Bell*, *Agnes Lang*, *Margaret P. Lang*, *Agnes Lang*, *Janet Lang*, *John Lang*.

In the current stock ledger, the register of the bank, extending from the year 1856 to 1869, on the same page with the stock account in the names of Mr. *Bell*, and the other trustees and executors of Mr. *James Lang*, there appeared a note of the assumption of the new trustees; the account being as follows:

Peter M'Callum, hardware merchant, *Greenock*; *John Bell*, flesher, *Dumbarton*; *Archibald M'Callum*, writer, *Port-Glasgow*; and *James M'Callum*, residing in *Greenock*, as trustees and executors of the deceased *James Lang*, steamboat master, *Dumbarton*, the major number being always a quorum. (Here followed the account of shares held.)

NOTE.—By deed of assumption by the above-named *John Bell* and *Archibald M'Callum*, the only surviving executors of the said deceased *James Lang*, of date the 18th of May, 1865, they nominate and assume the following trustees to

act along with them:—Mrs. *Agnes Meikle M'Callum* or *Lang*, residing in *Greenock* (relict of the truster); *John Lang*, iron merchant, *Greenock*; *Margaret Lang*, *Agnes Lang*, and *Janet Lang*, all children of the marriage between the said *James Lang* and *Agnes M'Callum* or *Lang*.

This entry is continued in the stock ledgers down to the stoppage of the bank on the 2nd of October, 1878, unaltered.

On the 26th of September, 1872, there was another meeting of trustees, and the following minute was signed by all of them:

Mr. *Lang* submitted a state of the trust account, and the trust funds, the capital as at June amounting to £4266 18*s.* 9*d.*, which having been examined was found correct. He also tabled the scrip of the bank stock shewing that the same had been transferred into the names of all the trustees original and assumed, as directed at the previous meeting."

(Signed.) *Agnes M. Lang, John Bell, Archibald M'Callum, John Lang, Margaret Park Lang, Agnes Lang, Janet Lang Hill.*

The scrip so tabled was the certificate of stock, which was as follows:

City of Glasgow Bank,
Glasgow, 16 April, 1869.

These certify that the trustees of the late *James Lang*, steamboat master, *Dumbarton*, have been entered in the books of this company as the holders of eight hundred and fifty-five pounds consolidated stock.

John Turnbull, p. Manager.

Robert Reid, p. Accountant.

NOTE.—This certificate must be deposited with the bank before a transfer for the whole or any portion of the stock can be issued or a new certificate granted.

(*Written on the back.*)

John Bell, flesher, *Dumbarton*; *Archibald M'Callum*, writer, *Greenock*; Mrs. *Agnes Meikle M'Callum* or *Lang*, residing in *Greenock*, relict of the deceased *James Lang*, the truster; *John Lang*, iron merchant, *Greenock*; and *Margaret Lang*, *Agnes Lang*, and *Janet Lang*, all children of the marriage between the said *James Lang* and Mrs. *Agnes Meikle M'Callum* or *Lang*, the surviving executors nominated by the said *James Lang*, and assumed as per deed of assumption by the said *John Bell*, and *Archibald M'Callum* dated the 18th of May, 1865.

As to the special case of *Janet Lang* or *Hill*, born on the 15th of May, 1846, she was a minor when assumed a trustee in 1865, and also in 1867, when she authorized the stock to be transferred. But after she came of age she signed a minute of ratification, dated the 27th of June, 1871, which said *inter alia*, "We the undersigned . . . having examined the foregoing sederunt book,

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do hereby severally ratify and confirm all the acts, and intromissions of the trustees therein specified, and express our thanks to them." (Signed) "*Janet Lang*," &c.

On the 26th of September, 1872, she was a married woman, and signed the minute of that date as such.

The minute of admission also contained, *inter alia*, that none of the names of the Appellants were included in any of the annual returns furnished by the bank to the Registrar of Joint Stock Companies. The transfer register does not contain any entry relating to any deed of assumption of the Appellants (other than Mr. *Bell*) as trustees, and there is no marking on the extracts of Mr. *Lang's* settlement, or the deed of assumption of 1865, or the extract registered deed of assumption of 1871, that these writs had been produced to the bank, unless the note on the back of the deed of assumption of 1865, "Fees, £2 1*s.* 6*d.*, paid *A. M.*" (admitted to stand for "*A. M'C.*," and agreed to be held *pro non scriptis*) had that effect.

The First Division of the Court of Session on the 22nd of January, 1879, refused the petition of the Appellants to have their names expunged from the register of shareholders of the bank, and from the list of contributories (1).

On appeal,[1]

March 25, 27. Mr. *J. Napier Higgins*, Q.C., and Mr. *Romer*, maintained that the assumed trustees had never agreed to be registered; and had never become shareholders of this company. By articles 37 and 38 of the copartnership (2), a transfer, a bilateral deed containing the acceptance of the stock, and an agreement to undertake the obligations of the partnership, was absolutely necessary; there was none here. The minute of the 18th of May, 1865, was merely an agreement amongst the trustees, and no evidence of their acceptance of the position of partners. And the note on the stock ledger was a mere explanation of the position of the assumed trustees, such as is allowed by the law of *Scotland* in the case of a trustee in bankruptcy or an adjudging creditor.

Under Article 34, this being a gratuitous transfer, it should

(1) Scottish Law Rep. vol. xvi. p. 249; Court Sess. Cas. 4th Series, vol. vi. p. 548.
(2) *Ante*, p. 342, *Muir's Case*.

have been passed by the directors. The deed of assumption of 1865 could not be taken as a transfer. It also had no certificate of registration marked upon it; nor was it entered in the transfer register; the absence of certain necessary formalities made all the difference.

As for Mr. Bell, there was no legal evidence that the trust disposition had been shewn to the bank. He did not receive the dividends, and therefore never was dealt with, or acted as a partner.

As to Mrs. Janet Lang, or Hill, she was clearly not bound by the transactions during her minority; the document signed after she became of age did not amount to an acceptance, and as a married woman in 1872 she could not validate that which was before invalid. [They cited *Ortigosa* v. *Brown, Janson, & Co.* (incomplete transfer) (1), and commented on *Companies Act*, 1862, s. 25.]

Mr. *E. E. Kay*, Q.C., Mr. *Benjamin*, Q.C., Mr. *Davey*, Q.C., and Mr. *Kinnear* (of the Scotch Bar), contended that the liquidators, guided by sects. 154 and 196 of the *Companies Act*, 1862, found by Article 40 of the copartnership that all persons whose names appeared on the stock ledger were to be taken as the proprietors of the several shares standing in the said ledger in their respective names. The Appellants' names were there, and the onus lay on them of proving that their names were wrongly entered. Mr. *Lang* was requested to effect the transfer, and the production of the deed of assumption of 1865—which was a proper transfer containing a complete disposition and acceptance of the whole trust—to the bank, was sufficient intimation that a transfer had been executed. It could not be said that the deed of assumption of 1865 was not a transfer, merely because the directors did not prepare it. It was impossible for the Appellants to get over the evidence of the 26th of September, 1872, when Mr. *Lang* "tabled the scrip of the bank shewing that the same had been transferred as directed." Since 1872 the assumed trustees had remained on the register without objection; the rights of creditors had now attached, and the petition was too late. Enough had been done to estop denial of partnership: *Lindley* on Partner-

(1) 38 L. T. pp. 145–7.

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ship, vol. ii. (4th Ed.) p. 1351; *Straffon's Executors* (1); *Hoare's Case* (2); *Mayhew's Case* (3); and *Maguire's Case* (4).

As to Mrs. Janet Hill, she ratified the transfer when she came of age, and she had not repudiated it within four years, the time allowed by the law of *Scotland: Bell's* Prin., Ed. 1872, pp. 2098, 2099; *Erskine*, 1 : 7 : ss. 33, 34, 39, 40. Also *Lindley* on Partnership, p. 82, laid it down that the only privilege of an infant was that of repudiating the contract within a reasonable time; that applied also to the case of an infant accepting office of trustee. Mrs. *Hill's* marriage in 1872 did not affect the question, inasmuch as a married women could hold the office of and act as trustee.

[EARL CAIRNS, L.C. :—The husband's name is not on the list, and he might be able to shew that the wife never ratified the acts of her minority.]

The husband became liable, as a matter of course; he therefore had an interest in the question whether her name, and through hers his name, should not stand upon the register; but nothing had been done in the Court below which would foreclose the title of the husband on his own right, or that of his wife, to raise the question of liability.

[EARL CAIRNS, L.C. :—If this lady is fixed by an unalterable decision of this House upon the list of contributories, and her husband is challenged, he has lost the right he ought to have of shewing that his wife ought not to be on the list.]

The wife presents this petition with her husband's consent, and he has not lost any opportunity of shewing that no liability ought to fall upon him.

Mr. *Higgins*, in reply :—

The deed of assumption of 1865, even if produced to the bank, did not justify the assignment of stock without the express authority of the assignees.

The liquidators had made no claim against Mr. *Hill*, though he would be liable to be put on the list of contributories in respect of his wife's liability, unless it could be shewn that she contracted to

(1) 4 De G. & Sm. 256.
(2) 2 J. & H. 229.
(3) 5 D. M. & G. 837.
(4) 3 De G. & Sm. 31.

bind her separate estate; but that had not been averred here, and the husband had not been called in his own interest.

The Law Peers having taken time to consider their judgment, delivered the following opinions:—

May 20. EARL CAIRNS, L.C.:—

My Lords, the Appellants in this case were registered at the time of the failure of the bank as the holders of £855 stock. They were described as the trustees of the late *James Lang*. The Appellant *Bell* was the survivor of the original trustees named in the trust disposition and settlement of *James Lang*, dated in 1850. The other Appellants were assumed as trustees by deed, dated the 18th of May, 1865, and they are also beneficially interested under the trust. They have been fixed upon the list of contributories as personally liable in respect of the shares, and they appeal from an interlocutor of the Court of Session, which has refused to take off their names.

The general liability of trustees has been settled by the decision of your Lordships in the case of *Muir* (1). In the present case it only remains to consider the special grounds of objection which the different Appellants make.

With regard to *John Bell*, he contends in substance that the stock was not validly transferred into his name, and that he never has been a shareholder in the company.

The facts of the case as to Mr. *Bell* are very simple. He and certain other trustees, since deceased, of *James Lang* were confirmed executors after Mr. *Lang's* death, and £400, part of the stock in question, was transferred into their names, and entered in the transfer register as transferred, on the production of the confirmation. Mr. *Bell* signed a mandate on the 30th of July, 1851, addressed to the directors of the bank, authorizing Mrs. *Lang* the widow to receive the dividends, a mandate which would have no meaning if the shares had not been in his name. In December, 1851, Mr. *Bell* and his co-trustees bought for the trust £550 more of the bank stock. He signed the transfer for this stock, and it was duly registered in the name of himself and his co-trustees.

(1) *Ante*, p. 337.

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He gave a new mandate authorizing Mrs. *Lang* to receive the dividends of all the stock. On the 17th of April, 1867, he signed a mandate at a meeting of the trustees agreeing that the stock should be transferred to the surviving original trustees and the assumed trustees, and on the 26th of September, 1872, he signed another mandate recognising that this transfer had been made. It appears to me to be not open to dispute that Mr. *Bell* was, with his full knowledge and consent, a shareholder in the bank, and regularly entered in the bank books as such.

I may take together the case of the other Appellants, excepting for the present *Janet Lang*. They say that they never gave any authority for their names being placed on the register of shareholders, and that in fact they were never received by the company as shareholders.

On the 18th of May, 1865, the original trustees of *James Lang* were reduced to two in number, *Bell* and *M'Callum*. At a meeting of trustees held on that day, and entered in the book of the trust, *M'Callum* laid before the meeting a deed of assumption nominating the Appellants Mrs. *Lang*, *John Lang*, *Margaret Lang*, *Agnes Lang*, and *Janet Lang* to be trustees with *Bell* and *M'Callum*, in the management of the trust estate, and they, being called in, accepted the office and subscribed the minute in proof of their acceptance. The deed of assumption was duly engrossed in the sederunt book of the trust. At another meeting of the trustees, held on the 17th of April, 1867, the minute of which was signed by the same parties, the meeting, taking into consideration that the whole of the bank stock stood in the names of the original trustees, it was unanimously agreed that the stock be transferred to the surviving original trustees and the assumed trustees, and Mr. *Lang* was instructed to have this done forthwith. At another meeting of the trustees, held on the 26th of September, 1872, the minute of which is signed by the same parties, Mr. *Lang* is stated to have produced the scrip of the bank stock, shewing that the same had been transferred into the names of all the trustees, original and assumed, as directed at the previous meeting. The stock ledger of the bank contains a note of the deed of assumption, and of the names of the assumed trustees, and the certificate of stock which was produced at the meeting of the

26th of September, 1872, certifies that the trustees of the late *James Lang*, had been entered in the books of the company as the holders of £855 consolidated stock; and on the back are written, apparently in the same writing, the names of the trustees, including the Appellants.

Putting aside for the moment the case of *Janet Lang*, I cannot doubt but that on these facts your Lordships have a clear and complete case of the other Appellants agreeing to have the bank stock placed in their names and of this having been done in a form perfectly sufficient, and to which neither they nor the bank could afterwards take any exception. I think the reasoning of the Lord President upon this point is perfectly satisfactory, and I do not think it necessary to repeat it (1).

(1) The Lord President said:—

In 1872, therefore, it was brought to the knowledge of all those parties that they had in terms of their own instructions, been registered; that is to say, the stock had been transferred into their names as the holders of that stock; and I may just remark in passing, with regard to one of those trustees, Miss *Janet Lang*, who was by this time married, and signed her name as *Janet Lang Hill*, that she was in minority when she was assumed as a trustee, but at the date of this meeting she was in majority, and quite capable not only of holding the office of trustee, though she was a married woman, but capable also by that act of validating what had been done while she was in minority.

Now, that being the state of the facts so far, it seems to me impossible to resist the conclusion that these Petitioners, other than *John Bell*, agreed to become members of the company, in respect of the shares or stock left by Mr. *Lang*, and also in respect of the stock purchased by the original trustees. But it is said that though there may be such an agreement, they were never in point of fact registered as shareholders, and we are told by the counsel for the Petitioners, that there is an irregularity in the way in which this was gone about, in so far as the deed of assumption was not in any way entered in the transfer register. It is said that the omission of that form, which is prescribed by the contract of copartnery, is fatal to the effectual registration of those persons as partners of the company, and that though their names may appear in what the law calls the register of shareholders, and what the contract of this company calls the stock ledger, nevertheless, if those particular steps towards complete registration have been neglected, the whole thing is ineffectual.

Now, my Lords, that is a plea we have heard advanced several times in the course of this liquidation, and I think it has always been met in the same way. All those arrangements in a contract of copartnery prescribing the number of books in which entries are to be made for the purpose of exact book-keeping, are so many regulations for the conduct of the bank's affairs, and do not in the least interfere with the substance of the right of a party who has bought or otherwise acquired shares, and been registered as a share-

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With regard to *Janet Lang*, it is to be observed that she was not of age at the meetings of the trustees in 1865 and 1867, and she

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holder, to participate in all the rights of a shareholder, the counterpart of which right is that he shall be subject to all the liabilities of a shareholder. They are formalities of more or less importance, as preserving regularity in the way in which the business of the bank is conducted; but that is a matter entirely for the regulation of the bank itself, and does not in the slightest degree affect the question whether a person has become a shareholder of the company by agreeing to become a member, and being registered as such.

But the clause of the contract of copartnery which is founded on here does not in my opinion in any way support the allegation that there was in point of fact any irregularity or any omission in this case. The 38th section of the contract provides for the manner in which the officials of the company shall proceed when they have presented to them either a transfer of shares duly accepted or an assignation of shares in security, or a confirmation of shares belonging to a deceased partner; but it does not prescribe the way in which a case of this kind is to be dealt with, which is quite different from any of these. We shall see by and by whether the execution of this deed of assumption has been given effect to in the register of shareholders in such a way as to make the assumed trustees partners of the company. But I do not see very well how the officials of this bank could have entered this deed of assumption in the register of transfers. They have no authority in the contract of copartnery for doing so, and, I think, just as little is there anything in the Act of Parliament which could have suggested the necessity of doing so, for there are really no such books as transfer books mentioned in the Act of Parliament at all.

Well, then, if that be unnecessary to constitute the character of a shareholder of the company, with its accompanying rights and liabilities, let us see what was done with this deed of assumption—how it was dealt with by the officials of the bank. It appears that when it was presented, the proper officer, whoever he was, made an entry in the stock ledger then current, which is the stock ledger No. 4, under the entry by which these shares stood registered in the names of the original trustees of Mr. *Lang*. The entry of the original trustees was in these terms [reads entry, *ante*, p. 551]. Now, as the entry originally stood, the original trustees were registered as joint owners of these shares, but so soon as any of these original trustees died, the deceasers ceased to be joint owners of those shares, and the surviving trustees remained the sole joint owners, viz.—*John Bell* and *Archibald M'Callum*. Well, the first statement in this note shews that of the original joint owners there were only two left; but these two, in consequence of the decease of their co-trustees, remained to all intents and purposes the joint owners, and the only joint owners, of the shares, until, by deed of assumption, the particulars of which are here set forth, they assumed the other petitioners to act along with them in that trust.

Now the effect of that deed of assumption in law was to make the two surviving trustees and the assumed trustees for the future the joint owners of these shares. It appears to me that this is quite a convenient and adequate

cannot therefore be held bound by what passed at those meetings. She was of age at the time of the meeting of the 26th of September, 1872, but she was then married to her present husband *Robert Hill*, and he is no party to this appeal, and was not a party in the Court of Session. It is possible that, besides the minute of the 26th of September, 1872, the previous minute dated the 27th

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mode of effecting an alteration in the entry of the owners of these shares in the register of shareholders. It is just an amendment of the title of that entry to the effect of striking out the names of all the original trustees other than *John Bell* and *Archibald M'Callum*, and adding as joint owners the names of the Petitioners. It must be observed that there is no particular form prescribed, either by the contract of copartnery of this bank or by the statute, in which the register of shareholders is to be kept. If you follow the substance of the direction in the contract of copartnery or in the statute, that is quite sufficient. Now, what does the contract require? It requires that the name and designation, and place of abode, of every partner, together with the number of shares held by him or her, shall from time to time be entered in a book to be kept for that purpose, to be called the stock ledger. That is all that is required. Now, my Lords, is that not done here? You have here in the original entry the name, designation, and place of abode of each of those trustees, and you have the number of shares held by the trustees jointly, and that is all that the contract requires. Then, when these new trustees were assumed, you have given, by reason of the alteration thereby effected, the name, designation, and place of abode of the two surviving trustees and of the assumed trustees, and you have the number of shares held by them. From that it appears to me that, in so far as the contract is concerned, the provision as to the keeping of the register is fully complied with.

Reference was made to the 25th section of the Act of Parliament, but I have great doubt whether the 25th section of the Act applies to this case. No doubt that section applies to every company under this Act, but then, be it observed, that is in the first part of the Act, which applies to companies created under the Act. But this is not such a company. This is a company created before the passing of the Act of 1862, but registered under the Act in terms of sections contained in the seventh part of the statute. Now, when we turn to the seventh part of the statute, we find in sect. 196 this provision:—"When a company is registered under this Act in pursuance of this part thereof," &c. [Reads]. It would rather appear to me, therefore, that the existing regulations as to the mode in which the register of this company is to be kept is to be found in the 39th article of the contract rather than in the statute. But, waiving that consideration, and taking the 25th section of the statute as being applicable to the case, let us see what it requires. It requires that a book of register shall be kept, and that there shall be entered therein the following particulars—the names and addresses, &c. [Reads]. Now, my Lords, I think there is substantial compliance in the entry with which we are dealing, with the provisions of sect. 25 also, supposing it to be applicable.

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of June, 1871, made after she came of age and before her marriage, may have to be considered with regard to her liability; but if she is to be placed upon the list of contributories, her husband's name ought, under the 78th section of the *Companies Act*, 1862, to be placed along with hers, and the question of her liability should be decided in his presence.

I propose, therefore, to move that, except as to the Appellant *Janet Hill*, the appeal should be dismissed; and that as to *Janet Hill* it should be declared that her name should *in hoc statu* be removed from the list of contributories, without prejudice to the right of the official liquidators to place upon the list the names of her husband and herself in her right. I do not think this slight variation of the interlocutor ought to make any difference as to costs, inasmuch as this was not the point raised by the petition to the Court of Session, and I therefore shall move that the Appellants pay the costs of the appeal.

LORD HATHERLEY:—

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My Lords, I agree in the conclusion which has been come to by my noble and learned friend on the woolsack, and I take this opportunity at once of stating that as these numerous cases which have been argued at your Lordships' Bar have a great many points in common, I shall not think it necessary to repeat on every occasion the grounds of my concurrence. I think we have established by the decision of your Lordships' House in *Muir's Case* (1), that those persons whose names appear upon the register as holding shares are personally liable, and must continue on the list of contributories, notwithstanding that there may be added to their names a description of them as being trustees for *A.*, or *B.*, or *C.*, or whoever it may be. The grounds for this were given in *Muir's Case*, and of course I do not now repeat them. Perhaps I ought to observe that there is one case on which I shall take the liberty of making a few observations to your Lordships, and that is *Buchan's Case* (2), where the question arises in a somewhat different form.

I apprehend, my Lords, that in each of these cases the first thing we have to ascertain, guided by the decision which has

(1) *Ante*, p. 337. (2) *Post*, pp. 583, 589.

preceded these cases, is this: was the person, at the time when the list of contributories was made out, rightfully upon the list of shareholders at all? If he has been induced by misrepresentation to let his name be placed there, that may be one thing which may have to be considered, regard being had to the rights of third parties and creditors in the case. If he has been put upon the list without any authority from himself, he is not rightfully upon the list at all. But when we have been satisfied that he was upon the list at the time of the liquidators making up the list,—if they find him as a shareholder of the company at the time to which their attention is directed, namely, the time of the winding-up, then I apprehend there can be no doubt of his being responsible personally; and that responsibility is not qualified by his describing himself as "trustee."

A second point we shall have to inquire into and to decide in some of these cases, although it does not occur in this case, is whether or not he made due application to withdraw his name from the list of shareholders at a proper time for that to be done, and whether the delay in withdrawing his name has been from some neglect or default on the part of those whose duty it was to remove it at his request. In such cases we must consider how far the application has been such as ought to have been complied with, and we must examine into the facts of the case in that respect. Having done that, I apprehend, my Lords, if we find that he was originally on the list by his own authority, and that he never took any adequate steps in point of law for the removal of his name from the list, the consequence is inevitable, that, having begun to be, he continues to be, at the time we have to take into our consideration, a person proper to be placed upon the list of contributories at the time of the winding-up.

Now, my Lords, in the cases we have to determine, the points will be, I apprehend, principally matters of fact. They will require some application of principles of law to the facts of the case; but those principles of law are, nearly all of them, very well known and undisputed. There may be one or two, at most, of the cases upon which I shall feel it necessary to make some observations; generally speaking, when I find the facts narrated in the opinion of my noble and learned friend upon the woolsack,

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which I have had the privilege of seeing before entering this House, in its printed form, I shall think it quite sufficient to say that I concur in the judgment, as I do in the present case.

LORD PENZANCE :—

My Lords, it appears to me to have been clearly established by the entries made in the sederunt book of the trust, to which the Lord Chancellor has referred in detail, that the original trustees of *James Lang*, together with the assumed trustees (the other Appellants) determined on the 17th of April, 1867, to have the stock now in question transferred into their own names, and that they authorized Mr. *Lang*, as their legal adviser, to effect and complete this transfer. The question raised on this appeal is, whether he effectually did so. There is no doubt that he communicated to the bank the deed of assumption by which the new trustees were added to the remaining original trustees ; and there can, I think, be little doubt or question that he did so for the purpose of causing the new trustees to be entered on the stock ledger as joint owners of the bank stock. There is also no doubt that the officers of the bank treated the matter in the same light, for they issued a certificate which the entry in the sederunt book of the 26th of September, 1872, declares that Mr. *Lang* " tabled, shewing that the stock had been transferred into the names of all the trustees, original and assumed, as directed at the previous meeting."

Your Lordships have, therefore, before you proof of the most unquestionable nature that the Appellants desired and intended that this stock should be placed in their names and themselves registered as owners of it; that the officers of the bank intended the same thing; and that both parties considered that the thing had been effectually done.

It is in this state of circumstances that the Appellants contend that no such transfer was legally effected, because they say the proper entries were not made in the book which is called the " stock ledger."

I pass by the question whether if there had been a defect in the entry made in that book, it would have availed to relieve the Appellants from the responsibility of shareholders, because I am of opinion that the entry actually made in that book was sufficient.

The entry is in this form. It first gives the names of the original trustees and executors of *James Lang*, and underneath those names is an enumeration of the stock held by them, and then at the foot of the above particulars there is an entry headed "note," stating that "By deed of assumption by the above-named survivors of the trustees and executors of the date of the 18th of May, 1865," they "nominate and assume to act along with them;" and then follow the names in full of the new trustees, the present Appellants. The effect of this "note," in connection with the entry to which it is a "note," appears to me to be this, that it was a short and convenient way of writing in the names of the new trustees into the previous category of trustees, to whom the original entry declared the stock to belong; and that it is as if a marginal note had been placed opposite the word "trustees" in the original entry stating that certain individuals had since been added to the number of those who originally filled that office. So read the entire entry would be a substantial statement that the original trustees, together with those added since, were the holders of the stock to which the entry related. In no other view could the fact of the assumption of new trustees properly find its place in the stock ledger which professed to be a list of the holders of stock and nothing more.

With regard to *Janet Lang* or *Hill*, although I confess I should have thought that as the present suit was carried on by her "with the consent of her husband," he had had ample opportunity of opposing through her the addition of her name to the list of contributories, I am not prepared to dissent from the Lord Chancellor's proposition.

LORD O'HAGAN:—

My Lords, I concur with my noble and learned friends, and I can add nothing material to their observations. Your Lordships' ruling in *Muir's Case* (1) determines that all the Appellants are liable unless they, or some of them, can shew that they were not validly registered as shareholders.

It seems to me that they have failed in shewing this. *John Bell* was an original trustee of *James Lang*. The other Appellants were assumed trustees. On this there is no controversy.

(1) *Ante*, p. 337.

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As to Mr. *Bell*, it is equally uncontroverted that the stock of the *City of Glasgow Bank* was transferred to him, and that he signed repeated mandates to the bank authorizing a particular disposition of the dividends, which involved an admission of his knowledge of the transfer and an adoption of any liability legally attaching to it. I confess I do not see the smallest reason to doubt that he became a shareholder and has continued a shareholder with his own privity and consent, and that his appeal must therefore be dismissed.

As to the assumed trustees, the case is not less clear. Of their assumption of the trust no doubt has ever been suggested, and of their agreement that the stock should be transferred to themselves and the original trustees, and of their knowledge that it had been effected accordingly, the evidence is conclusive. They became shareholders to all intents and purposes, and, according to the decision in *Muir's Case*, their liability was complete.

Therefore, I concur that the appeal must be dismissed, save as to *Janet Lang* or *Hill*, as to whom I agree that your Lordships should make the declaration suggested by the Lord Chancellor.

LORD SELBORNE and LORD BLACKBURN were of the same opinion, and did not think it necessary to add anything.

Judgment:—Declared and adjudged: That as to the Appellant Janet Hill her name should in hoc statu be removed from the list of contributories, without prejudice to the right of the liquidators to apply to the Court of Session to place upon the list the names of her husband and herself in her right, but reserving to the last named parties all competent objections; with this exception, It is ordered and adjudged, that the interlocutor complained of in the appeal be affirmed; And it is further ordered that the Appellants do pay to the Respondents the costs of the appeal.

Lords' Journals, 20th May, 1879.

Agents for Appellants: *Simson & Wakeford.*
Agents for Respondents: *Martin & Leslie.*

2. ALEXANDER MITCHELL'S CASE.

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ALEXANDER MITCHELL'S CASE.

Appeal from an interlocutor of the Court of Session refusing to remove the name of *Alexander Mitchell*, the Appellant, from the register of the *City of Glasgow Bank*.

The Appellant was a trustee and executor of *Andrew Watters*, deceased, who died in May, 1875, leaving a trust disposition dated the 8th of March, 1859, and on the 16th of October, 1878, £3500 stock of the bank was standing in the name of the Appellant and his co-trustees in the books of the bank. The stock was transferred into their names on the production of the confirmation in their favour as executors; the entry in the stock ledger, after giving the names and addresses of the Appellant and his co-trustees, ran:—"Original and assumed executors of the said deceased, *Andrew Watters*, confirmed as such conform to confirmation in their favour by the commissariat of *Edinburgh*, the 12th of July, 1875."

On the 16th of October, 1878, the Appellant resigned his office of trustee under 24 & 25 Vict. c. 84, by a minute entered in the sederunt book of the trust (1), and signed in the book by himself and the other acting trustees. On the 17th of October he caused a certified copy of the minute of resignation to be delivered to the secretary of the bank at its head office, and requested that in pursuance thereof his name should be removed from the register. On the same day the secretary replied, "I am instructed to say that under present circumstances we are unable to comply with your request."

The "circumstances" referred to in this letter were the insol-

(1) By the Act 24 & 25 Vict. c. 84, s. 1, it is enacted:—"All trusts constituted by virtue of any deed or local Act of Parliament under which gratuitous trustees are nominated shall be held to include the following provisions, unless the contrary be expressed—that is to say (*inter alia*), power to any trustee so nominated to resign the office of trustee."

And by the Act 30 & 31 Vict. c. 97, it is enacted, s. 10, that "any trustee entitled to resign his office may do so by minute of the trust, entered in the sederunt book of the trust, and signed in such sederunt book by such trustee, and by the other trustee or trustees acting at the time."

Sect. 18 further provides that, in all cases where a trust deed appoints the trustees to be also executors, the resignation of any such trustee shall infer, unless where otherwise expressly declared, his resignation also as an executor under such trust deed.

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vency and stoppage of the bank, and the facts with regard to the stoppage of the bank were these: On the 2nd of October it ceased to carry on business and closed its doors. It never resumed business; and it was admitted between the parties that its stoppage was notorious on and after that date throughout the *United Kingdom*, and that the directors knew at the time of the stoppage that the insolvency of the bank was irretrievable. On the 5th of October the directors convened an extraordinary general meeting of the shareholders by advertisement for the 22nd of October to consider, and, if thought fit, to pass resolutions under the *Companies Act*, 1862, to wind up the bank voluntarily by reason of its inability to carry on business. And a notice to the same effect was sent to every person whose name appeared on the stock ledger (1). On the 11th of October the directors instructed the secretary, by a minute of that date, to reply to all requests for transfer of shares that the directors did not feel warranted to prepare or register any transfer of the bank stock. On the 16th of October a further minute on the same subject was made, stating that "counsel concurred in thinking that the directors in present circumstances of the bank were not warranted, and that it would be improper for them to execute or register any transfer or to take up any stock which brokers may have bought for the bank." The last meeting of the directors was held in the forenoon of the 18th of October, and they took no charge of the business of the bank thereafter; and the following morning they were apprehended on a criminal charge. On the 22nd of October the resolution was passed for the voluntary winding-up of the bank, and the winding-up under the Act commenced from that day.

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(1) The notice was in these terms:—"*City of Glasgow Bank.*—Notice is hereby given that an extraordinary general meeting of the *City of Glasgow Bank* will be held within the *City Hall*, No. 90, *Candleriggs, Glasgow*, on Tuesday, the 22nd inst., at two o'clock in the afternoon, for the purpose of considering, and, if thought fit, passing as extraordinary resolutions, pursuant to sub-section three of section one hundred and twenty-nine of 'The *Companies Act*, 1862,' the subjoined resolutions, and of appointing liquidators, and fixing their remuneration.

"*Resolutions*—That it has been proved to the satisfaction of this meeting that the *City of Glasgow Bank* cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same.

"That the *City of Glasgow Bank* be wound up voluntarily.

"Dated *Glasgow*, 5th October, 1878."

A minute of admissions was arranged by the parties, which contained the above facts, and also, *inter alia*, that "It was the practice of the bank on receiving notice of the resignation of a trustee or executor, to make an entry of the fact by a note in the stock ledger at the place where the name of the person resigning was entered therein."

On the 7th of November, 1878, the official liquidators in making up a list of the contributors to the bank, placed on it the name of the Appellant and his co-trustees as holder of shares and liable for calls in their own right. They subsequently made a call on them individually and collectively for £500 per £100 of stock, and refused to remove or alter the position of the Appellant's name. He thereupon petitioned the Court of Session to order his name to be removed from the register of the bank, and from the list of contributories, in terms of the 35th section of the *Companies Act*, 1862 (1). The petition having been remitted to the First Division, their Lordships, on the 21st of December, 1878, held that the directors were not entitled to make any change upon the register subsequently to the declaration of insolvency (2).

On appeal,

March 27, 28. *The Lord Advocate* (Right Hon. *W. Watson*) and Mr. *Napier Higgins*, Q.C., contended, for the Appellant, that he having effectually resigned his office of trustee and executor by virtue of the 24 & 25 Vict. c. 84, had ceased to have an interest in the trust, and his interest had accresced to the remaining and consenting co-trustees. If it was necessary, in order to give effect to the resignation as severing the Appellant's connection with the bank, for a note to be made on the stock ledger, according to the

(1) By the 35th section of the *Companies Act*, 1862, it is enacted, that "if the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this Act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may . . . . apply for an order of the Court that the register may be rectified, and the Court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct, &c., as to costs."

(2) Scottish Law Rep. vol. xvi. p. 165; Court Sess. Cas. 4th Series, vol. vi. p. 439.

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admitted practice of this company, it was the duty of the directors to make that alteration; and they, not having done so, were guilty of delay and default: *Companies Act*, 1862, s. 35. The resignation being formally completed, and duly intimated to the bank, before the commencement of the winding-up, which was the 22nd of October, 1878: 131st section of *Companies Act*, 1862; the whole estate had been vested in the remaining trustees, and therefore no registered transfer was needed to divest it: see *Oswald's Case* (1).

Prior to the resolution to wind up, the bank was not actually and completely bankrupt, nor in course of winding-up, therefore the directors were not relieved from their obligation to make this alteration. The question here was, had the right of the Appellant to resign been taken away by the common law of *Scotland* because of the insolvency? They maintained it had not. The word "insolvent" had two meanings—first, where the means of the bankrupt trader are sufficient to eventually pay all his creditors in full; secondly, where the trader's means are palpably insufficient ever to pay them. Here all the creditors would in time be paid in full; therefore the removal of the Appellant's name would not injure their rights. The words "irretrievably insolvent" meant that the bank could not carry on business again unless reconstituted, though it might pay its debts eventually. [They also commented on *Nation's Case* (2); *Shepherd's Case* (3), mentioned by Lord *Shand* (4); *More* v. *Eglinton* (5); *Findlay's Case* (6); *Bell's* Prin. p. 162, *et seq.*; Scotch Statute of 1696, c. 5; *Allin's Case* (7); and *Lindley* on Partnership, 4th ed. pp. 701, 1402; *Weston's Case* (8); *Gilbert's Case* (9).]

Mr. *Kay*, Q.C., Mr. *Benjamin*, Q.C., Mr. *Davey*, Q.C., and Mr. *Kinnear* (of the Scotch Bar), maintained, for the liquidators, that the Appellant's name appearing on the register of shareholders, the onus of shewing that it was wrongly there through the default and delay of the directors lay on him. Assuming there was

(1) Scottish Law Rep. vol. xvi. p. 221; Court Sess. Cas. 4th Series, vol. vi. p. 461.
(2) Law Rep. 3 Eq. 77.
(3) Law Rep. 2 Eq. 564; 2 Ch. 16.
(4) Scottish Law Rep. vol. xvi. p. 164.
(5) Court Sess. Cas. 2nd Series, vol. xiii. pp. 1381, 1385.
(6) Ibid. vol. xvii. p. 1014.
(7) Law Rep. 16 Eq. 449.
(8) Law Rep. 4 Ch. 20.
(9) Law Rep. 5 Ch. 559, 565.

executed a proper transfer here, the bank had unequivocally declared its absolute and irretrievable insolvency on the 2nd of October, 1878—fourteen days before the resignation—and therefore any transfer of shares executed after that date was of no effect—certainly there could be no valid transfer after the notice of the 5th and resolution of the directors of the 11th of October: see opinions of Lord *Romilly* in *Nation's Case* (1), and Lord *Selborne* in *Allin's Case* (2); and also this was a gratuitous assignment, and required the sanction of the directors under the articles of partnership, clause 34.

The general principle of the law was, that from the moment of failure the inadequate funds of a bankrupt became the common property of the creditors. Here the rights of creditors had attached from the moment of stoppage, and it was quite consistent for the directors to have refused to sanction any transfer after that date; therefore there was no default on the part of the directors under the 35th section, *Companies Act*, 1862. This was not a judicial winding-up, which commences at the date of the presentation of the petition (sect. 153), but a voluntary liquidation, where there must be an interval between stoppage and the passing of the resolution; therefore, if it was decided that transfers may take place after failure, and before the actual passing of the resolution to wind up voluntary, the consequence would be disastrous, and voluntary winding up in the future would be impossible. It was a different case where shares were *bonâ fide* sold *before* the failure, and the transfer left at the office, and then delay in registration ensued. But here there was no transfer: the moment a trustee or executor resigned office, the trust estate did not vest in the remaining trustees. To complete the assignment of trust estate standing on a written title, it was necessary that the co-trustees should sign the resignation, and accept a transfer, which to be effective must have been entered on the company's books; and such a conveyance by a resigning trustee was contemplated by sect. 10 of 30 & 31 Vict. c. 97: *Findlay's Case* (3) and *More* v. *Eglinton* (4) did not apply, but see *Martin* v. *Wright* (5). [They also commented on *Lindley* on

(1) Law Rep. 3 Eq. 81, at p. 82.
(2) Law Rep. 16 Eq. 455.
(3) Court Sess. Cas. 2nd Series, vol. xvii. p. 1014.
(4) Court Sess. Cas. 2nd Series, vol. xiii. p. 1381.
(5) Ibid. vol. iii. p. 485.

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Partnership, 4th ed. p. 1412; *Bell*, Com. vol. i. p. 8 (7th ed.); *Companies Act*, 1862, sects. 25, 35, 37, 129, 131; and 33rd, 34th, 37th, 38th, 39th, and 40th clauses of the articles of co-partnership (1).]

The Lord Advocate, in reply.

The Law Peers having taken time to consider their judgment, delivered the following opinions:—

May 20. EARL CAIRNS, L.C.:—

My Lords, the general question of the liability of the Appellant in this case as a trustee is disposed of by the decision in *Muir's Case* (2). The only point to which I have to direct your Lordships' attention is the claim of the Appellant, under the 35th section of the *Joint Stock Companies Act*, to have his name removed from the register upon the ground that before the winding-up of the bank commenced he resigned his office of trustee, and intimated his resignation to the bank. [His Lordship having stated the facts as above, p. 567, then continued:—]

The name of the Appellant having been duly entered upon the register, and appearing there at the time of the winding-up, he is clearly liable to be placed on the list of contributories, unless he can shew something more than his mere resignation of his trusteeship. His resignation of his trusteeship alone would not terminate his liability to the bank. He ceased to be a trustee; but it remained for him to terminate his liability in respect of the bank by a transfer, or something equivalent to a transfer, of his shares. This transfer the bank refused to make, and the Appellant has therefore to shew, under the 35th section, that default has been made, or that unnecessary delay has taken place, in entering on the register the fact of his having ceased to be a member.

The words of the section with regard to delay may be put out of the case. There is no question of delay. The application of the Appellant was considered and was answered, and the answer was a refusal under the circumstances to remove his name. The real question therefore is, Was there a default in the directors in not removing his name?

My Lords, in an ordinary partnership there is of course no

(1) *Ante*, pp. 341, 342 (*Muir's Case.*) (2) *Ante*, p. 337.

power in a partner to assign over his interest in the partnership, and thus to get rid of liabilities to those who have claims against the partnership. In the case of a joint stock company the shares are made transferable, and the arrangements for effecting a transfer are part of the general powers given to the directors in the management of the concern, the control vested in the directors over the right of transfer being in some companies greater and in others less.

My Lords, I should be very much disposed to hold that the power given to the directors to transfer shares, whether it were a power merely ministerial or a power attended with a right of investigation or option, was, as was said by my noble and learned friend Lord *Selborne* in *Allin's Case* (1), a power intended to be in operation, together with the other clauses of the deed of settlement and while the company was carried on as a going concern, for the purposes of a common agreement, and was not intended to be in operation for the purpose of enabling individuals to escape from liability when the company had ceased to be a going concern, and when the general clauses of the deed were no longer capable of being acted on.

But, my Lords, I do not think it is necessary in the present case to lay down a general rule in terms so extensive. The directors of the *City of Glasgow Bank* were acting, in the management of the business of the company, as the agents of the shareholders. Among their other duties was that imposed on them by the 46th article of the deed, which provided that if it should appear at any time on balancing the books, that a sum equal to the whole of the reserved surplus fund, and also to one-fourth part of the paid-up capital stock, had been lost, a special general meeting of the shareholders should be called, and the company should thereupon be dissolved, unless a majority of two-thirds in value should determine otherwise. The directors had closed their doors and publicly announced the stoppage of the business on the 2nd of October. It would have been competent to any creditor at any time afterwards to have presented a petition to the Court for the winding-up of the company, for which petition there were ample materials, and the presentation of the petition would under the Act have been the commencement of the winding-up, after which

(1) Law Rep. 16 Eq. 449.

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no valid transfer of a share could have been made. It is impossible to doubt that what prevented an adverse application to wind up the company was the notice issued by the directors on the 5th of October, which in effect stated to the public that they would call the shareholders together on the 22nd for the purpose of winding-up the company voluntarily on the ground of its insolvency. There was involved in this notice an appeal to all persons interested to support the directors in the proposal for a voluntary liquidation in preference to an adverse liquidation. Now if the directors, after thus taking the step most calculated to disarm those who had a right to proceed adversely against the bank, had used the interval to permit or facilitate arrangements in the constitution of the bank, it appears to me they would have been acting both in opposition to the spirit of the 46th article and in bad faith to those having claims upon the company; and that not only were the directors of the company precluded under the circumstances from assenting to transfers, but that the shareholders also, whose agents and representatives the directors were, were precluded from making those transfers.

I am therefore of opinion that there was no default under the 35th section in the directors not entering on the register the fact of the Appellant having ceased to be a member of the company, and that the decision of the Court of Session was right, and I must move that this appeal should be dismissed with costs.

LORD HATHERLEY:—

My Lords, I concur entirely in the view which has been taken of this case by my noble and learned friend. I do not know that there is any special point of law which arises upon it, and as to the facts I am, as I have already said (1), satisfied with the printed opinion of my noble and learned friend, which I have read, and which sets forth the facts very clearly and concisely.

The Appellant applied to have his name removed from the list of shareholders, not substituting any other, and not having made any arrangement with his co-trustees themselves by which he was to be removed from the list. The removal of his name from the share list of the company under those circumstances would so far have removed not only a security which his co-trustees had, but

(1) *Ante*, p. 562.

also a security of every shareholder and creditor of the bank. It seems to me that if this application was justified a name might be removed on the application of any shareholder at the mere will and pleasure of the directors, at their option, and without any special ground for exempting that shareholder from the liabilities which had been incurred and which were then obviously on the point of being enforced. I do not think the 35th section, which speaks of "delay" and "default," is applicable to a case of that description, thinking, as I do, that it would have been a breach of duty on the part of the directors, who were to hold an equal hand as between all the shareholders, to shew a favour to one particular shareholder, under the circumstances of the case, more than to another.

LORD PENZANCE:—

My Lords, the facts upon which the present Appellant contends that his name should be removed from the list of contributories have been stated by the Lord Chancellor.

There is no doubt that on the 16th of October, 1878, he ceased to be a trustee by resignation of that office—but the question is whether, in the event that happened, he has established to your Lordships' satisfaction that his name ought to be removed from the register and thereby from the list of contributories. There are two sufficient answers I think to this claim. It is argued by the Respondents, I quote from their printed case, that "the Appellant's resignation of the office of trustee and executor cannot dissolve the partnership relation into which he and his co-trustees entered in terms of the contract of copartnery of the *City of Glasgow Bank*. The office of trustee and executor which the Appellant took up by acceptance and laid down by resignation, is entirely different from the relation of partnership into which he entered, not by accepting office as trustee and executor, but by producing and recording the confirmation in the bank's books. He entered the partnership in terms of the contract, and must retire in conformity therewith." In this reasoning I think your Lordships ought to concur.

Now the only way in which a partner could, under the provisions of the deed of co-partnery, divest himself of his share in the bank would be by a deed of transfer, the form of which is to

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be regulated by the directors. But no such deed has ever been executed, and although the Appellant would, after his resignation, have a right to call upon his fellow trustees to concur in all necessary deeds and acts for effecting a transfer of his interests in the bank, and the bank would be bound, under ordinary circumstances, to give effect to such deeds and acts by removing his name from the register—the mere act of resigning his office of trustee cannot, even though communicated to the directors, properly be held to be equivalent to a transfer, or "*per se*" to entitle the Appellant to have his name thus removed.

But there is a wider and more substantial ground upon which I consider the appeal should be rejected. The powers which the Court of Session and your Lordships are asked to exercise, are the statutory powers conferred by the 35th section of the *Companies Act*, 1862, by which it is provided that the Court may, "if satisfied of the justice of the case, make an order for the rectification of the register" by deleting the name of the applicant. But can it be said that the Court of Session ought to have been "satisfied of the justice of the case?" The bank had ceased to carry on its business upon the avowed ground of its hopeless insolvency, before the Appellant resigned the office of trustee or took any step to retire from the partnership. When he applied to the directors, therefore, to sanction his retirement from the partnership, he did so, not for the purpose of terminating his connection with the bank in future, and thereby exempting himself from its future obligations, for there could be none, the business being wholly suspended, but for the sole purpose of escaping his partnership liability for the past. The most that the Appellant can urge is that the resignation of the office of trustee operated as a gratuitous assignment of his shares, which, "to be effectual," required under sect. 34 of the deed, "to be sanctioned by the directors." But how could the directors with justice to the creditors and the other shareholders of the bank, sanction an assignment which, instead of being made in the ordinary course of business, and for the purpose of putting an end to the assignor's interest in the bank in future, could be designed only to free the shareholder from liabilities already incurred?

Without going so far as to say that the suspension of business on account of insolvency would necessarily in all cases operate to

suspend all the powers of the directorate respecting the transfer of shares,—upon which I offer no opinion,—it is, I think, clear that such powers could not be exercised without a dereliction of duty in a case like the present. It is common I believe to all systems of bankruptcy to take the act of closing the trader's doors and suspending his business, as the dividing period of time after which the rights of his creditors ought not to be compromised by any transaction of the bankrupt. This is entirely conformable with justice—and although the present case, being that of a company, does not arise under the bankrupt laws, the principles of justice which should govern it appear to me to be the same. If then there had been an actual assignment by the Appellant of his interest in the partnership stock, there is no clause in the deed which obliges the directors to "sanction" it—and there is nothing in the events and circumstances which occurred that ought to "satisfy" the Court of Session or your Lordships "of the justice of the Appellant's case" in claiming to have his name removed from the register of shareholders.

LORD O'HAGAN :—

My Lords, the sole question in this case is, whether the Appellant, on the 17th of October, 1878, was entitled to require of the directors of the *City of Glasgow Bank* that his name should be taken from the register? If he was not, his appeal should be dismissed; if he was, it ought to be allowed.

He was admittedly the trustee and executor of *Andrew Watters*. As such, he had stock duly registered in his own name in the month of October, 1878, and, unless the responsibility attaching to him as the holder has been somehow discharged, it equally attaches to him now. On the 16th of October, 1878, he ceased to be a trustee by resignation; and, on the 17th, he endeavoured to have his name taken from the register. His abandonment of the trusteeship could not, confessedly, affect his relations with the bank, whilst his name continued on the register; and he did not require the removal of it until the 17th of October after insolvency had been declared and business suspended, and the directors had summoned a meeting for the 22nd of that month, with a view of winding up the concern.

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Under those circumstances, I concur with my noble and learned friends, that it was not only the right, but also the plain duty of the directors, to refuse the demand for removal. In refusing it, they were not guilty either of delay or of default. They had closed the bank, and undertaken, subject to the opinion of a general meeting, to wind up the company, and the admission of a claim, in the meantime, to escape liability on the part of the registered stockholders would have been, in my opinion, at once a breach of their duty as agents for the persons interested, a misuse of powers which the position of the bank appears to me, although it is not necessary to give a decision on the point, to have rendered them incapable of exercising, and a fraud upon the creditors, who might easily, by the multiplication of such claims, if they were at all admissible, have been robbed of the entire security on which they had relied.

I think that this appeal also must be dismissed.

LORD SELBORNE :—

My Lords, with respect to this case and all others which depend upon the question whether the right of transfer continued to exist down to the commencement of the winding-up under the Act of 1862, it is necessary to consider the general question of the position of the bank after its stoppage, or at all events after the issue by the directors of the circular calling the meeting with a view to the necessary resolution for a voluntary winding-up.

I think that after that circular had been issued, it was too late for any shareholder to transfer his shares, either to the co-partnership itself or to any other person, and therefore too late for a trustee, previously registered and liable, to relieve himself from liability by resigning his office, and intimating that resignation to the directors.

This conclusion, as it appears to me, might safely be rested, in this and the other cases depending on the same principle, with which your Lordships have now to deal, on the 46th clause of the co-partnership deed ; which provides that, in the events which (in the present case) had beyond all question happened, "a special general meeting of the shareholders shall be called by the manager, under authority of the ordinary directors, and the com-

pany shall thereupon be dissolved, unless a majority of two-thirds in value of the shareholders, personally or by proxy, present at such meeting shall determine otherwise," and shall thereupon fulfil certain onerous conditions. A special general meeting was (in the circumstances which brought this clause into operation) actually called, for the purpose contemplated by the clause (for winding-up is dissolution), on the 5th of October, by the manager, under the authority of the directors; and the circumstances were such as to make it certain beyond the possibility of doubt, that the alternative course, contemplated by the deed, could not and would not be taken. The directors, in issuing that notice under the deed, were clearly acting in the due discharge of their duty as the common agents of all the then shareholders, however much they might have previously departed from their duty in any other respects. What was the consequence? Under the deed itself there was from that moment an inchoate dissolution, subject only to a contingency which could not happen, but which, even if it had been possible, would not have prevented the notice from having the effect of an inchoate dissolution, until it actually happened. From the time when the machinery for dissolution, created by the deed, was so put in motion (and which would naturally prevent the creditors from pursuing other remedies equally effective which they might otherwise have immediately put in force, by presenting a petition for compulsory winding-up under the *Companies Act* of 1862), I consider that the bank was, by the very terms of the common contract, incapable of continuing its business, and that the directors could thenceforth do nothing except on the footing of dissolution. They were, therefore, right in refusing to accept or register any transfer, &c.; the whole arrangements of the deed, for changes in the constitution of the partnership, being of a kind to which the notice necessarily put an end.

LORD BLACKBURN:—

My Lords, the *City of Glasgow Bank* closed its doors on the 2nd of October, on the 5th of October the directors convened an extraordinary general meeting for the 22nd of October, for the purpose of passing resolutions to wind up the bank voluntarily, and on that day the resolutions were passed. The Appellant was

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a person whose name stood on the register, and who had taken steps to transfer his shares, and after the 5th of October, and before the 22nd of October, brought the transfer to be registered. The directors refused to do so, not on any special ground applicable only to this particular transferor, but on the general ground that under such circumstances they were not warranted in registering any transfer of bank stock. The present proceeding is under the 35th section of the Act of 1862, and the first question, which, if decided in favour of the Respondents, disposes of this and also of some other cases, is whether a refusal of the directors, under such circumstances, to register any transfers during the interval between the stoppage of the bank and the holding of the meeting on the 22nd of October, was a rightful refusal or was a default. This is, I think, a new question, not decided by any authority either in English or Scottish law which I have been able to discover.

If either those who framed the Act of 1862, or those who framed the deed of co-partnership, had thought of providing for such a case, I cannot much doubt that it would have been expressly declared that it should not only be in the power but should be the duty of directors to act as those did; but it has not been provided for expressly. I have felt more hesitation than either the Court below, or, I believe, any of your Lordships, as to how far we can properly import a condition which, however just and expedient, is not in terms expressed. But I have come to the conclusion that we must hold that the directors had authority to do this.

The board of directors are constituted the managing body of the company, and as such are agents of necessity, having authority to act for it in all cases of emergency where there is not time to consult their constituents. And, therefore, when the bank stopped payment, they were acting strictly within their implied authority when they closed the doors of the bank and convened the extraordinary meeting.

And it seems to me that no such meeting could properly and effectually be convened if all or any of the shareholders who were on the register and liable for its debts could use the necessary interval so as to escape from that liability. The maxim, *Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud,*

is, I think, founded in reason and applicable to these cases. And, consequently, I think that, having come to the conclusion that authority was given to the directors to convene the meeting, I am bound to conclude that authority was also given to them to suspend the registration of all transfers till the result of the meeting so convened was known.

I consequently agree that this appeal must be dismissed, with costs.

LORD GORDON concurred.

Interlocutor appealed against affirmed; and appeal dismissed with costs.

Lords' Journals, 20th May, 1879.

Agent for Appellant: *W. A. Loch.*
Agents for Respondents: *Martin & Leslie.*

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3. RUTHERFURD'S CASE.

Appeal from an interlocutor of the First Division of the Court of Session refusing the petition of the Appellants, four original trustees under the trust disposition of a Mrs. *Jessie Fletcher*, to have their names taken off the list of contributories to the bank.

The material facts of the case are sufficiently stated in the opinion of the Lord Chancellor.

At the hearing of the appeal the same counsel appeared for the parties as in *Alexander Mitchell's* case (1).

EARL CAIRNS, L.C.:—

My Lords, this is a very simple case, and will be found to be governed by what your Lordships have decided in the cases which have preceded it.

The Appellants are the four original trustees of one *Jessie*

(1) The facts of the stoppage of the bank on the 2nd of October, 1878, and the notices issued by the directors on the 5th and the 11th, will be found, *ante*, at p. 568.

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Fletcher, who held £500 stock in the *City of Glasgow Bank* (1). Her trust disposition and settlement and confirmation were, with the authority of the Appellants, produced to the bank, and the Appellants were on the 7th of May, 1873, entered on the stock ledger or register of members. On the 18th of October, 1878, after the bank had stopped payment, the Appellants, by a deed of assumption and a minute in the sederunt-book of the trust, assumed *John Fletcher* and Mrs. *Helen Fletcher* or *Walker* as trustees, and at the same time the four Appellants themselves resigned the trust, their resignation being accepted by the trustees whom they had assumed. On the same day the Appellants executed a transfer of the stock to *John Fletcher* and Mrs. *Helen Fletcher* or *Walker*, and on the 19th of October delivered a notarial copy of the deed of assumption, minute of resignation, and transfer, along with the stock certificate, to the secretary of the bank at the head office, and required the transfer to be registered so that the names of the Appellants might be taken off the register. This the secretary, under the general order of the directors, refused to do, and the names of the Appellants were placed by the Respondents on the list of contributories.

My Lords, I think your Lordships will be of opinion upon this statement of facts, as indeed was admitted at the Bar, that this case must be governed by the decision in *Alexander Mitchell's case*, and therefore I will not do more than move your Lordships that the appeal should be dismissed with costs.

LORD HATHERLEY concurred.

LORD PENZANCE:—

My Lords, the only difference between this case and the last is that in this case the Appellants did as trustees execute a deed of transfer with the view of relieving themselves of liability, their resignation having been accepted by the trustees whom they had assumed. But the general reasoning which applied to the last case, upon which your Lordships held that the directors were

(1) For clauses of the bank articles of co-partnership see *Muir's Case*, *ante*, pp. 340–344.

quite justified in refusing their consent to the transfer, applies equally to this case.

LORD O'HAGAN, LORD SELBORNE, LORD BLACKBURN, and LORD GORDON concurred.

Interlocutor appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 20th May, 1879.

The agents for both parties were the same as in *Alexander Mitchell's case.*

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4. BUCHAN'S CASE.

Appeal against an interlocutor of the First Division of the Court of Session by *John Buchan*, writer, *Peebles.*

The facts of the appeal were thus stated by the Lord Chancellor:—

By a deed of trust disposition dated the 10th of July, 1840, three persons, *Thorburn, Spalding,* and *Turnbull,* were appointed trustees and executors by *Robert Gibson* and *Janet* his wife of all their estate, which included £540 *Glasgow Bank* stock. By a codicil dated the 31st of May, 1851, *Gibson,* the truster, taking notice of the death of *Turnbull,* one of the trustees, nominated the Appellant in his stead, and granted and disponed to him all his real and personal estate in trust as mentioned in the original deed, and with the same powers conferred on the other trustees. After the death of *Gibson* the Appellant was treated as one of the executors as well as trustee; the confirmation included his name, and he himself signed the oath before the commissary on giving up the inventory of the estate, in which he stated that he and the others had acted as executors. He subsequently signed with the others dividend warrants of the bank stock, adding the description "executor and trustee," and after the death of the others described himself as "sole surviving executor." The transfer of the stock was made in the stock ledger on the 3rd of November, 1854, from

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the name of *Gibson* into the name of his executors. This was done on the authority of the law agent, *John Bathgate*, in a letter to the manager of the bank, dated the 2nd of November, 1854. The certificate of stock is in the name of the Appellant and his co-trustees, and this certificate, as well as the letter of *Bathgate*, came out of the custody of the Appellant. The dividend warrants included the name of the Appellant up to 1872; that of the 1st of February, 1872, is signed by him with the description "sole surviving executor." Since 1872 they are signed by him along with two new trustees assumed in that year. My Lords, to this I have to add that neither the Appellant nor the law agent, Mr. *John Bathgate*, is examined to rebut or in any manner qualify the inference naturally to be drawn from the facts which I have mentioned.

The minute in sederunt book of the meeting of the trustees on the 7th of June, 1854, was as follows:

PRESENT—*Walter Thorburn*, Esq., *Peebles; John Buchan*, Esq., *Peebles;* and Mr. *Thomas Spalding*, *Peebles*, trustees nominated by the said deceased (*Robert Gibson*), by his settlement dated the 10th of July, 1840, and codicil thereto dated the 31st of May, 1851.

The trustees present agreed to accept the office of trustees, to which they have been appointed by the deceased.

Mr. *Bathgate* was instructed to record the settlement, and to make out an inventory of the whole estate, and report to a future meeting, as also to collect any outstanding debts.

Walter Thorburn, John Buchan, Thos. Spalding.

The letter from Mr. *Bathgate* to the manager of the bank, dated the 2nd of November, 1854, was in these terms:

SIR,—I send you confirmation in favour of the trustees of the late *Robert Gibson*, and will thank you to transfer the sixty shares of your stock standing in his name to that of his trustees. Please return confirmation, along with a certificate in name of the trustees.—I am, &c.,

For *John Bathgate, J. D. Bathgate.*

And the stock certificate:

18 Dec. 1860.

[Old Share Certificate not delivered up.]

These certify that *Walter Thorburn*, merchant, *Peebles; Thomas Spalding*, nurseryman there; and *John Buchan*, writer there, executors of the late *Robert Gibson*, *Peebles*, as per confirmation at *Peebles*, 12th October, 1854, have been entered in the books of this company as the holders of five hundred and forty pounds Consolidated Stock.

The entry in the stock ledger, subsequent to death of *R. Gibson*, the truster, and down to the stoppage of the bank, was as follows:

Walter Thorburn, merchant, *Peebles*; *Thomas Spalding*, nurseryman there; and *John Buchan*, writer there, executors of the late *Robert Gibson*, *Peebles*, as per confirmation at *Peebles*, 12th October, 1854,—Executors of *Robert Gibson*.

Bound up with the transfers of the bank was a memorandum of the confirmation; and in the sederunt book of trust were entries of expenses for getting the confirmation, and "Expenses of Transfer, *City Bank*, Nov. 7, 1854, 8*s*."

Walter Thorburn died on the 15th of February, 1867, and *Thomas Spalding* on the 31st of October, 1870. The Appellant assumed two trustees, *James Spalding*, nurseryman, and *John Turnbull*, painter, *Peebles*, on the 20th of March, 1877, to act along with him, but their names were never placed on the register of the bank. On the 2nd of October the bank stopped payment, and on the 22nd the shareholders passed a resolution to wind up voluntarily: see *Muir's Case* (1). On the 22nd of October the Appellant executed a minute of resignation of his office of trustee, under *The Trust (Scotland) Act*, 1867, 30 & 31 Vict. c. 97, s. 10. The Appellant's name having been placed on the list of contributories to the bank, he presented a petition to the Court of Session to order the removal of his name from the register, and from the list of contributories. He also claimed exemption from liability on the ground that he had resigned his trusteeship. On the 24th of December, 1878, a proof was led, and the parties agreed to a joint minute with reference to facts and documents. The First Division of the Court of Session, on the 23rd of January, 1879, held that the Appellant's name was rightly on the list (2).

On appeal,

March 31. Mr. *Napier Higgins*, Q.C., Mr. *Trayner*, and Mr. *J. A. Reid*, contended for the Appellant that he was not, and never was an executor, in which character alone his name had been placed on the register. He was nominated to, and had accepted, a totally different office, namely, that of trustee. He had given no authority for his name being placed on the register as a member, which authority must be established by the clearest and

(1) *Ante*, p. 337.

(2) Scot. Law Rep. vol. xvi. p. 512; Court Sess. Cas. 4th Series, vol. vi. p. 567.

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most undeniable evidence. All the agent was authorized to do was to signify to the bank that the Appellant was entitled to draw dividends.

In *Lumsden* v. *Buchanan* (1) Dr. *Buchanan* intromitted with the estate, approved of the purchase of shares at a meeting of trustees, and had received dividends, but he was exempted from liability expressly on the ground that he had not signed the deed of accession. That case applied here.

[LORD SELBORNE:—In *Lumsden* v. *Buchanan* (1) the liability was founded on the deed of accession; here the liability is founded on the confirmation, to which the Appellant was a party, and which afterwards passed into the books of the bank.]

A man might be willing to take out confirmation to an estate, but not to become a shareholder. It was quite proper to give directions to an agent to secure the trust estate, but it would be an extraordinary thing to imply from the instructions here to the agent an authority to register his name as a partner in a company of unlimited liability. The simple production of the confirmation was not sufficient authority to justify the entry in the register. Nor could the receipt of dividends be held to make him liable, for by the 33rd section of the *Companies Act*, 1862, a representative of a deceased partner can dispose of the shares without becoming a shareholder himself; and therefore, *à fortiori*, can receive dividends. See also sects. 24, 76, 99, and 105. The office of executor was quite distinct from that of trustee. Neither the confirmation nor the trust disposition and codicil had ever been recorded in terms of the 38th article of the co-partnership; therefore the Appellant, in terms of the bank contract, had not been competently assumed a partner.

[They also cited *Bulmer's Case* (2); *Turquand* v. *Kirby* (3); *Jamieson* v. *Clark* (4); and *McLaren* on Wills, vol. ii., p. 196, ss. 1757, 8.]

Mr. *Kay*, Q.C., Mr. *Benjamin*, Q.C., Mr. *Davey*, Q.C. and Mr. *Kinnear* (of the Scotch Bar), for the liquidators:—The Appellant

(1) Court Sess. Cas. 3rd Series, vol. ii. p. 695, and vol. iii. (H.L.) p. 89; 4 Macq. 950.

(2) 33 Beav. 435.

(3) Law Rep. 4 Eq. 123.

(4) Court Sess. Cas. 3rd Series, vol. x. pp. 399, 405.

was a partner of this company, he was not on the register in a representative capacity. There was nothing in any of the articles to the effect that executors or trustees could become members with a less liability than other shareholders. The mode by which representatives of others became partners was by producing their confirmation to the bank: article 38; thus transferees and executors were placed on the same footing. By article 39, partners' names were to be entered on the stock ledger, and, article 40, their being there was to be *primâ facie* evidence of membership. Executors of partners in this company must either become members or sell the shares within a certain time, they had no other alternative. So also under the *Companies Act*, 1862, an executor need not register himself, but if he did, he became a partner: clause 76.

[LORD SELBORNE:—That distinctly contemplates representative liability.]

Certainly, if the executor did not get the shares put into his own name. It was impossible for the Appellant to successfully deny that he became an executor. He clearly took the place of *W. Turnbull*, an executor under the trust disposition; he signed the minute of the 7th of June, 1854. He took an oath before the commissary that he was an executor; then followed the stock certificate naming him as executor, which was produced by the Appellant. Also they had a great number of dividend warrants—some signed as "trustee"—but on the 2nd of February, 1871, the Appellant had signed one with his co-executors, as "executors and trustees," then on the 1st of February of the next year he subscribed in his own handwriting, "*John Buchan*, sole surviving executor, *Peebles*." In addition to this, they had the account in the sederunt book, registration of confirmation by the bank, 8*s.*, signed by the Appellant as correct. The best persons to deny that any authority was given to produce the confirmation to the bank would have been the Appellant and the agent; neither were examined. There was not the slightest analogy between the case here and Dr. *Andrew Buchanan's Case*, in *Lumsden* v. *Buchanan* (1) that authority might apply if the confirmation here had only been taken out in, and had only contained the names of, the other two executors, and the

(1) Court Sess. Cas. 3rd Series, vol. ii. p. 695, and vol. iii. (H.L.) p. 89; 4 Macq. 950.

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bank officials had inserted in the register the Appellant's name. The liquidators were not bound under the *Companies Act*, 1862, to prove that the partner's name was placed on the register with his authority; the *onus* of proving the negative was expressly thrown upon the Appellant. The resignation on the 22nd of October, 1878, under 30 & 31 Vict. c. 97, had no effect. [They cited *Erskine* 3: 9; 27, 28, 29 (confirmation of executors); *Turner's Case* (1).]

Mr. *Napier Higgins*, in reply.

The Law Peers having taken time to consider their judgment, delivered the following opinions:—

May 20. EARL CAIRNS, L.C. [having stated the facts as above, at p. 583]:—

It appears to me impossible to say, looking to these facts, that the Appellant did not authorize the placing of his name on the register, or that he did not agree to become a partner of the bank.

I do not think it necessary to enter into an examination of the question whether the Appellant ought properly to have been described as "executor" or "trustee." I rest the conclusion at which I arrive not upon any question of form, but upon the substance of the case, namely, that the Appellant upwards of twenty years ago had the stock transferred into his name, and has ever since been upon the register of the bank as a partner, and that this state of things is, upon the principles laid down by this House in *Muir's Case* (2), inconsistent with any conclusion but that of personal liability.

I am the more anxious to point out the grounds upon which I base the conclusion at which I have arrived in the present case, inasmuch as it is easy to suppose circumstances in the case of an executor whose testator held shares in the *City of Glasgow Bank* which might not be covered by the decision in the case of *Muir*.

An executor whose testator has held shares in a joint stock company has generally one of two courses open to him. He may have the shares transferred into his own name, and become to all intents and purposes a partner in the company. He may, on the

(1) 2 De G. F. & J. p. 527. (2) *Ante*, p. 337.

other hand, not wish to have the shares transferred into his name, and he ought in that case to have a reasonable time allowed him to sell the shares, and to produce a purchaser who will take a transfer of them.

The 38th section of the deed of the *City of Glasgow Bank* provides that every assignment of shares in security or *mortis causâ*, and confirmations thereof by right of succession, shall after being completed be recorded in a book to be kept for that purpose, and such deeds, transfers, assignments, and confirmations shall be delivered or returned to those in right of the same after having marked therein a certificate of the registration thereof, and that the production of such writings to the manager, or ordinary directors, for the purpose of registration shall *ipso facto* infer the acceptance of the capital stock therein specified, and the liabilities of the parties having right to the same as partners of the company.

This article, if construed literally, would rather seem to imply that it was impossible for an executor to produce to the bank his confirmation as executor without being held thereby to authorize a transfer of the shares into his own name. In the particular case before your Lordships I cannot doubt that the Appellant did authorize this transfer to be made, that he knew that it was made, and that he for twenty years and upwards acted with the knowledge and upon the assumption that it was made. But I have no doubt that your Lordships would require, in any case in which the bank transferred the shares of the testator into the name of his executor, to be satisfied that this transfer had been authorized by a distinct and intelligent request on the part of the executor that the shares should be dealt with in this way, and that reasonable opportunity was afforded to the executor to transfer the shares to a purchaser in the ordinary course of administration of the estate, if he did not wish to have them placed in his own name.

A further question was argued as to the effect of a minute of resignation of the office of trustee on the 22nd of October, 1878, when the winding-up began. It is unnecessary to consider whether this was or was not valid as a resignation of the trusteeship. It was not intimated to the bank before the winding-up, and even if it had been, the decisions of your Lordships in the previous cases shew that no transfer of the shares could have been made by the

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bank. I would move your Lordships that this appeal should be dismissed with costs.

LORD HATHERLEY:—

My Lords, I concur. It is one of the cases which I alluded to in the few words I addressed to your Lordships upon *Bell's Case* (1). As I then said, there is a difference between it and *Muir's Case* (2) to the extent of *Buchan* being described as "executor" or "executor and trustee" instead of being described simply as "trustee."

I have had an opportunity of perusing the opinion which will be delivered to your Lordships presently by my noble and learned friend, Lord *Selborne*, and I observe that he entertains some doubt as to whether there be not a difference in position between an executor and a trustee, the character of trustee being the character given in *Muir's Case* (2), and the character of executor being the character given in this case. I have made particular reference to a case which my noble and learned friend pointed out to me in his opinion, a case decided by myself, namely, *In re Hoare* (3), in which I say that there may be a difference between the simple case of a trustee and the case of a person representing *in toto* a deceased testator. The case of *Hall*, decided by Lord *Cottenham* (4), was referred to in the case of *Hoare*. These are cases upon English Acts of Parliament, and upon English deeds, where, generally speaking, there are distinct provisions pointing out what steps are to be taken by persons who succeed to what is called in *Scotland* an "inheritance," including bank shares, or what is called in *England* "personal estate," pointing out the steps to be taken as between them and their company, in order to relieve them from the holding of shares on the part of the deceased, and to enable them to transmit them to others as trustees who will undertake the responsibilities.

Hall's Case, before Lord *Cottenham* (4), was a remarkable case, and indicates better what I intended to say in *Hoare's Case* than perhaps the simple reading of *Hoare's Case* itself. It was a case

(1) *Ante*, p. 550.
(2) *Ante*, p. 337.
(3) 2 J. & H. 229.
(4) 1 Mac. & G. 307, and later, 1 De G. M. & G. 1.

in which it was sought to remove from the list of contributories a gentleman (Mr. *Hall*) who had become trustee for a widow lady about to marry a second time, and who was possessed of shares in a joint stock company, as representing her first husband, in whose name the shares stood at the time of the lady's second marriage. There was nothing compelling the trustee to register himself as a proprietor and he had not done so. Lord *Cottenham* expressed an opinion upon two or three points of evidence as to whether or not he had made himself a partner by the acts he had done, which indicated an opinion on the part of Lord *Cottenham* that the trustee might have made himself a partner, and if he had accepted the position of a partner that would have led to his being put upon the list of contributories (1).

The facts of that case were very curious, and there were irregularities in the register; the shares being returned in various ways, at one time the lady was registered as proprietor in her first marriage name, "*Elizabeth Outerston*;" at another to "*A. Outerston*," the dead man himself; afterwards to "*A. Outerston's* executors;" then to "*A. Outerston's* trustee;" and lastly to "*Outerston, Elizabeth*, executrix of *Outerston, Andrew, John Hall* appointed as trustee to *Elizabeth Outerston*." She was put in the list of the shareholders as the proprietor in fact of the shares, and then the trustee's name was added with the word "trustee." Then again there was this fact in that case, which would of course put an end to all question of resting upon that, if it could otherwise be rested upon when we are dealing with the case of an executor, namely, that the word "trustee" was added by a clerk of the company without any distinct direction. Lord *Cottenham* held that there was nothing whatever to shew that the trustee, Mr. *Hall*, had ever accepted the transfer into his name, or the proprietorship. The fact being added that Mr. *Hall* was acting for Mrs. *Outerston* as trustee did not make the shares, shares standing in his name as proprietor: it only indicated to the company that they were to pay the dividends not to the lady but to the trustee. Accordingly the dividends were paid to him, and it was on those payments that it was sought to make him a proprietor. Lord *Cottenham* simply had the facts before him, and what was held to be the real substance of the

(1) 1 Mac. & G. at p. 314.

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imperfect entries was, that Mrs. *Elizabeth Outerston* was the proprietor, and that Mr. *Hall* was her trustee, and never intended to be in any shape or way the proprietor.

Now, in the case before us, whatever steps might have been taken by the Appellant as executor, he certainly first of all, it appears to me, through his solicitor or agent, Mr. *Bathgate*, desired his name to be entered upon the list of proprietors, and although he was placed upon it as executor this entry continues there for more than twenty years. He receives all the dividends payable upon the shares so registered, and I ask, if he was not a shareholder who could be? Nobody else held the shares, nobody else received the dividends, nor is there any evidence given, as has been observed by my noble and learned friend on the woolsack already, by Mr. *Bathgate* or by any one else, to shew that in truth those dividends were only received by him as the hand to receive them, just as a banker might receive dividends and deal with them afterwards, according as his client's interests required. There is nothing to shew that these dividends were received as part of the testator's estate, and dealt with by the executor as part of the property which had to be administered by him.

But more than that, if the Appellant was not the proprietor of the shares there was nobody entered at all upon the register who could be held to be liable in respect of them, because he took the step, which has been referred to by the Lord Chancellor, of requiring himself to be entered in such a way as necessarily to exclude any one else. One of the rules of the company itself, provided that when any one came and produced the probate and caused himself to be entered upon the register as executor he was so entered upon the register that nobody else could be deemed to be the owner of the shares. And anybody so entered was to receive all the benefits, and should be liable for all the debts and liabilities of the concern. Every share is or ought to be appropriated to somebody or other in the share register, and the creditors must search and look at the share register, which is to be their guide in order to find whom they are to apply to in case a necessity should arise for a contribution in consequence of their money not being paid. The creditors and the other shareholders do that. Now, in the list of contributories no other name appears than that of

the Appellant, because I apprehend that nothing that the creditors had seen in the register would authorize them in saying that any claim upon the shares so held should be paid out of the assets of the testator. In *Muir's Case* (1), no doubt, if the trustees were called upon to make any payment in respect of the shares they held as part of the trust estate, they would be entitled to an indemnity from the trust estate if that estate was able to give it. But if an executor instead of selling shares receives dividends upon them for more than twenty years, I apprehend it is much too late to say that he is not a shareholder. Having made a choice, and having taken the position in which he received the benefit of being placed on the share register, he must bear the burden of that position towards creditors of that co-partnership and towards other shareholders in the company. It is much too late for the Appellant to say now that he ought not to continue upon the list of contributories as being the owner of the shares, of which nobody is the owner if he is not, of which he caused himself to be entered as the owner according to the instructions given to Mr. *Bathgate*, and in respect of which he has consequently been paid dividends for this long time.

LORD O'HAGAN:—

My Lords, it appears to me that your Lordships' ruling in the case of *Muir* is fully applicable to this case also. The question in it is mainly one of evidence, and I cannot say I have any doubt —upon a consideration of the facts already stated by the Lord Chancellor—of the liability of the Appellant as a registered transferee of stock, who authorized the registering of it and exercised dominion over it, for years, by signing many dividend warrants, in one instance, at least, as "sole surviving executor" of *Robert Gibson*. The proof given and the proof withheld equally justify this conclusion; and I see nothing in the position of the Appellant to prevent the application to him of the principles on which your Lordships' judgment affirmed the liability of *Muir* as having been, with his own knowledge and assent, a registered holder of shares. There is a difference in the designations of the shareholders in the two cases; but the substantial grounds of

(1) *Ante*, p. 337.

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liability ascertained by the judgment in *Muir's Case* appear to me to be equally applicable to both. I concur with the Lord Chancellor as to the reasonable conditions of an executor's liability in such a case as this, and I think they are fulfilled in it.

The Appellant's resignation of his trusteeship cannot affect our decision, whether it was valid or ineffectual. The bank had nothing to do with it, and had no notice of it until after the 22nd of October. The name of the Appellant remained on the register, and, according to the judgments already pronounced by your Lordships, could not have been properly removed, and he, therefore, continued to bear the burthen of his liability. This appeal also must, in my opinion, be dismissed.

LORD SELBORNE :—

My Lords, if this had been the case of an executor, merely producing his confirmation to the officers of the bank for the purpose of having it recorded in their books, and receiving it back again with a note that it had been registered, and with a certificate describing him as holder of his testator's shares in terms which might have had reference to his character of executor, I should have been of opinion that he did not thereby become personally liable, whatever entries might have been made in the company's books; and that the subsequent receipt of dividends, even for many years, would have made no difference. The distinction, admitted by this House in *Lumsden* v. *Buchanan* (1) between the case of Dr. *Andrew Buchanan* and that of the other Respondents is very much against any inference of personal liability from the mere form of entries in the company's ledger, or even of the stock certificates issued by them, (though brought to the knowledge of the person sought to be charged, and acted upon by him in the receipt of dividends,) unless some sufficient foundation for it had been previously laid in the title, whether by allotment or by transfer, to which those entries and certificates ought to have related. On this point, the English authorities of *Armstrong* (2), *Blakeley's Executors* (3), and *Hall* (4) would have appeared to me material, if the present case

(1) Ct. Sess. Cas., 3rd Series, vol. ii., p. 695, and vol. iii. (H.L.), p. 89.

(2) 1 De G. & S. 565.

(3) 13 Beav. 133; 3 Mac. & G. 726.

(4) 1 Mac. & G. 307.

could not be satisfactorily distinguished from them. The 33rd clause of the deed of co-partnership of the *City of Glasgow Bank* expressly provided, that the shares of the several partners in the capital stock should "transmit and descend, as personal property, to their executors or representatives by testament;" and the 36th clause appears to me to exclude the supposition that it was intended to keep the rights, which should so "transmit and descend" upon the death of a shareholder, in suspense, until some novation of the title of the deceased shareholder took place: because it enabled the company to sell or appropriate the shares of a deceased shareholder only in two cases: (1) if an attachment of a creditor, by diligence of confirmation "*quâ creditor*" should not be removed; and (2) if, within twelve months after the death, no party should choose "to represent such deceased shareholder by confirming executor or otherwise assuming his estate:"—words which, in the case of an executor taking confirmation, certainly do not require more than the assumption of a representative character, involving a representative, and not a personal, liability. In conformity with the natural construction of these clauses, the 24th section of the statute, passed eight years after the date of the transfer to the Appellant and his co-executors, (the provisions of which have since that time been applicable to this bank,) expressly declares, that the legal personal representative of every deceased shareholder, in a company registered under that Act, may transfer the shares held by the deceased, although he may not himself be a "member" of the company.

The case of trustees who take a transfer of shares into their names differs, in principle, from that of executors who merely intimate their title, as executors, to a company, in order to claim and exercise the rights which belong to them as the legal representatives of their testator. That distinction was pointed out by Lord *Hatherley*, when Vice-Chancellor, in the English case of *Hoare* (1), where he said: "A person who is a shareholder is absolutely liable, although he may be bound to apply the proceeds of the shares upon a trust. The case is not the same as that of an executor; who may be a contributory as representing the testator's estate." Trustees have not, in any proper sense of the word, a

(1) 2 J. & H. 229.

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representative character; but executors have; and, when both the liability and the interest of the testator is transmitted to them by virtue of their testator's contract contained in such a deed as this, it must retain its original character, until there is a forfeiture, or a transfer: which ought not to be presumed from any equivocal acts. Having representative rights, it is impossible that they should not be entitled to produce the legal evidence of them to the company, for the purpose of having their title in some way recorded and recognised, without making themselves personally liable. This would be a necessary preliminary, even to the exercise (since 1862) of the statutory right of transfer.

The anxiety which I have felt to avoid error or misconception upon a subject of such general importance as this, as well as the unusual (and to me perplexing) form of the 38th clause of this deed, led me for some time to feel doubts as to the proper mode of disposing of this appeal. That clause mixes up the case of confirmation to the testamentary disposition of a deceased shareholder with that of any ordinary transfer, as if there were no difference between them. Every document produced under it is equally to be returned, having marked thereon a certificate of the "registration thereof." It seems to assume, that the terms, in which it describes the consequences to follow from the production and registration of any description of title to which it applies, are such as would, in all cases, be equally officious and appropriate: which could hardly be, as to an executor standing upon his confirmation only, without understanding them in a sense applicable to representative as well as personal liability. I have never had any doubt, that the letter of Mr. *Bathgate*, dated the 2nd of November, 1854, and everything since done with respect to the shares in question, was known to, and fully authorized by, the Appellant. My difficulty has been only as to the effect of what was so done: having regard to the legal position of executors, and to the peculiar form of this deed,—the 33rd and 36th clauses, on the one hand, and the 38th, 40th, and 6th clauses on the other.

It being, however, clear that it is competent for executors to transfer their testators' shares in such a company as this, and the liability of the transferees when they have done so being personal and unlimited, there can be no reason why executors, if they

choose to transfer their testators' shares to themselves, instead of to a third person, should not take the transfer with the same consequences of unlimited personal liability which would have attached to those shares in the hands of any other transferee. It cannot be said, that executors, (at all events when, as in this case, they are also disponees in trust,) have not the power to transfer their testators' shares to themselves. The question, whether such a transfer has, in effect, been made, or not, has always been the test, as between personal and representative liability, in the English cases of the same class with the present:—though no doubt, in those cases, there were better deeds, clearly giving notice to the executor that he must choose, under peril of forfeiture, between a transfer of the shares to a third party and the assumption of a personal liability, and pointing out how he was to proceed in either alternative. The imperfection and obscurity, in this respect, of the present deed, caused me for some time to hesitate as to the construction which ought to be placed upon the direct request contained in Mr. *Bathgate's* letter of the 2nd of November, 1854, for a transfer of *Robert Gibson's* shares into the names of his trustees. But after fuller consideration, and after having had the benefit of knowing the opinions formed by other noble and learned Lords, I am now satisfied, that for my hesitation on this point there was no sufficient ground. Such a request for a transfer, made by executors who were also trustees, and who had full power to transfer as they might think fit, followed by an actual transfer in the stock ledger and the issue of stock certificates in accordance therewith, and acted upon afterwards (as in this case it has been for twenty-four years), cannot, I think, be satisfactorily distinguished, as to its legal effect, from any other transfer to trustees. And it seems right to observe, that the Appellant himself, in his petition to the Court of Session, did not rely upon the distinction between representative and personal liability. He denied that he ever was executor, or ever authorized what Mr. *Bathgate* and the other executors did: and he asked, that his name should be wholly removed from the list of contributories. I cannot discover, from the opinions delivered by the learned Judges in the Court of Session, that any question arising out of the peculiar character of the title of an executor was argued before them: and, even at your Lordships' Bar that

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question (though distinctly raised by the last "reason" in the Appellant's case) was argued by the Appellant's junior counsel only, and by him not so fully as might have been expected, if it had not been felt that it was practically excluded by the facts of the case.

I cannot, therefore, withhold my assent from the judgment proposed by my noble and learned friend on the woolsack.

LORD GORDON concurred.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Lord's Journals, May 20, 1879.

Agent for Appellant: *William Robertson.*
Agents for Respondents: *Martin & Leslie.*

KER'S CASE.

5. KER'S CASE.

Appeal from an interlocutor of the First Division of the Court of Session.

The Appellant, *Alan Ker*, is one of four trustees under the marriage contract of a Mr. and Mrs. *Fyfe*, of *Greenock*, and his name is entered in the stock ledger of the *City of Glasgow Bank*, along with three others, as holders of £270 stock; two of these trustees being for some time dead, their names have been removed from the list of contributories in respect of this stock.

Mr. *Ker* contends that his name ought to be removed from the list, on the ground that he gave no authority to its being placed on the register of the bank. The liquidators of the bank maintain that although it is not proved that Mr. *Ker* gave antecedent authority, he has since adopted the act of the law agent for the trustees, and allowed his name to continue on the register as a partner. The Appellant never signed the deed of copartnership, or any deed of accession thereto. A proof was allowed by the Court of Session, when the following facts were elicited:

The contract of marriage, dated October, 1855, contained two trusts, one in regard to the wife's means and estate to come into

immediate operation; the other, mainly testamentary, embracing the estate of the husband at his death. The wife's estate consisted, *inter alia*, of *City of Glasgow Bank* stock and certain railway shares. In March, 1856, immediately after the marriage, Mr. *M'Clure*, the law-agent of the trust, got prepared a declaration of the settlement in terms of the *Companies Act* of 1845, for the purpose of having the trust estate transferred from Mrs. *Fyfe* to the trustees. The registration in the bank was brought about by Mr. *M'Clure*, sending this declaration through one of the trustees in *Glasgow* to the bank; and in this way the registration was effected. The trustees were entered on the stock ledger—the register of shareholders—as "trustees nominated and appointed in ante-nuptial contract of marriage betwixt, &c." A similar entry appeared in the transfer register. These entries remained intact and unaltered down to the stoppage of the bank, the 2nd of October, 1878.

Mr. *Ker* was not consulted as to the transfer by the law agent, and neither he nor any of the trustees signed the marriage contract; but they all signed a transfer to themselves from Mrs. *Fyfe*, as executrix of a Mr. *Bogle*, of certain *Glasgow* and *South-Western Railway* stock, in which deed the transferees are described as "trustees nominated under and by virtue of the said ante-nuptial contract of marriage." Also in the accounts of the law agent there was an entry, March 21, 1856, "trouble getting signatures of Messrs. *A. Ker* and *J. Welsh* to transfer and giving explanations."

On the 7th of August, 1856, Mr. *Ker* signed a dividend warrant, and appended to his signature the word "trustee," in his own handwriting. In that dividend warrant the shares are described as "standing in the name of trustees for Mr. and Mrs. *Fyfe, Greenock*, under marriage contract." At this period Mr. *Ker* was also agent for the *City of Glasgow Bank* at *Greenock*. At the end of 1856 he removed to *Liverpool* from *Greenock*, and ceased to take any action in the management of the trust estate. But before leaving he expressed in conversation a wish to resign his office of trustee, but Mr. *M'Clure* dissuaded him from doing so.

On the 20th of February, 1868, on the death of Mr. *Fyfe*, he was communicated with that it was desired to have a meeting of the trustees, he replied, that "he regretted he could not go north at present."

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On the 2nd of April, 1868, the law agent wrote to Mr. *Ker* as follows:

Dear Sir,—We understand that from your residence in *Liverpool*, you are not to act as a trustee under the late Mr. *W. H. Fyfe's* contract of marriage. We are therefore about to get the remaining trustees confirmed as executors, and it is necessary that we produce a letter under your hand declining to act. We annex form of the letter, and will feel obliged by your having it written out and forwarded to us.

We are, dear sir, yours truly,
M'Clure & M'Donald.

To which he replied:

Liverpool, 4th April, 1868.

Gentlemen,—I, *Alan Ker*, sometime merchant in *Greenock*, now sugar refiner in *Liverpool*, hereby decline the office of trustee conferred on me by the ante-nuptial contract of marriage entered into between the late *William Holborn Fyfe*, ship-chandler in *Greenock*, and Mrs. *Marjory Walker* or *Bogle*, then residing at *Barrhead*, dated 2nd October, 1856.

Your obedient servant,
Alan Ker.

After this, Mr. *Ker* does not appear to have been consulted by the other three trustees (*Neilson*, *Welsh*, and *Hall*), who continued to act without him. And they were confirmed executors-dative of Mr. *Fyfe's* estate, as the "sole accepting and acting trustees."

Subsequently, on the 31st of August, 1870, these three trustees signed a mandate to the bank as the "accepting trustees acting under the ante-nuptial contract of marriage," in which they authorized the bank to pay the dividends to Mrs. *Fyfe*.

In 1875, *James Welsh* and Mr. *Neilson* being dead, Mr. *Hall* as "the sole surviving accepting and acting trustee," executed a deed of assumption of new trustees, but their names were not entered in the books of the bank.

The oral evidence given by Mr. *Ker* in the Court below, so far as material, is sufficiently given in the Lords' opinions.

Mr. *Ker* having petitioned the Court of Session for the removal of his name from the list of shareholders and contributories, the First Division on the 24th of January, 1879, refused the petition, holding that Mr. *Ker* knew for many years that his name had been placed on the register, and had acted as trustee with that knowledge; that the resignation was of no avail, not being intimated to or acted on by the bank; and that the mandate of 1870 was

not a notice to the bank that he had ceased to act as a trustee (1), it being signed by three, who were a quorum.

On appeal,

March 31; April 1, 3. Mr. *Napier Higgins*, Q.C., and Mr. *M'Laren* (of the Scotch Bar), contended that the Appellant not having executed any transfer of this company's stock as required by the articles of copartnership, nor having in any other way signified his acceptance, had never become a partner; but even if he had become a trustee, his resignation of office in 1868 denuded him of all responsibility. The mandate after the death of Mr. *Fyfe* in 1870, signed by the other trustees as sole accepting and acting trustees, must be held as a good notice to the company that the Appellant had ceased to act; and the other trustees after that date always treated him as no longer one of them. Signing the transfer of railway stock could not be used against him, for that imposed no personal liability. Neither could the signing of one dividend warrant more than twenty-two years ago, unless it could be clearly shewn that he knew he had been placed on the register as individually liable.

[They cited *Bell*, Comm. vol. i. p. 145; *Bulmer's Case*, executrix, signed receipts for dividends without qualification as executrix, held not liable (2); *Armstrong's Case*, executor for five years signed receipts for dividends as executor, held not contributor (3); *Doyle's Case* (4); *Maxwell's Trustees*, power of trustees to resign (5); *Hill* v. *Mitchell* (1846), resignation of trustees, sustained (6); statutes 24 & 25 Vict. c. 84, s. 1, and 30 & 31 Vict. c. 97, s. 10; *Binney* v. *Ince Hall Coal Company* (7)].

Mr. *E. E. Kay*, Q.C., Mr. *Benjamin*, Q.C., Mr. *Davey*, Q.C., and Mr. *Kinnear* (of the Scotch Bar), for the Respondents:—

Here there was an *inter vivos* trust created by deed, therefore it was imperative for the law agent to get the estate out of the name

(1) Scottish Law Rep. vol. xvi. p. 507; Court Sess. Cas. 4th Series, vol. vi. p. 575.

(2) 33 Beav. 435.

(3) 1 De G. & Sm. 565.

(4) 2 H. & T. 221.

(5) Court Sess. Cas. 4th Series, vol. ii. p. 71.

(6) Court Sess. Cas. 2nd Series, vol. ix. p. 239.

(7) 35 L. J. (Ch.) (N.S.) pp. 363, 8.

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of the truster immediately after the completion of the settlement: *Lewin* on Trusts, ch. 14, p. 236; and cases there cited—*M'Gachen* v. *Dew* (1), &c. It could not be denied *M'Clure* was the law agent, and though he did not take the most direct road of securing the estate, he had effectually succeeded in transferring the stock into the names of the trustees. The only question then was, had the Appellant accepted the trust? The signing the transfer of railway stock and the dividend warrant, and his subsequent letters excusing his attendance at the meetings of trustees, was conclusive evidence that the Appellant knew that the settlement made him a trustee. To have the effect claimed for it, the resignation in 1868 should have been intimated to the bank, but that was not done; the absence of the Appellant's name from the subsequent dividend warrants and mandate could not be taken as an intimation. The liquidators represented the creditors of the bank, and the onus was thrown on the Appellant to shew that his name was improperly on the register to escape liability. He had not done so. The cases cited did not apply.

Mr. *Napier Higgins*, in reply.

The Law Peers having taken time to consider their judgment, delivered the following opinions:—

May 20. EARL CAIRNS, L.C.:—

My Lords, in this case the name of the Appellant appeared on the register at the time of the winding-up as the holder of shares in the bank, as a trustee under the marriage contract of Mr. and Mrs. *Fyfe*, dated the 2nd of October, 1855. Two questions have been raised upon the appeal: first, did he ever accept the trust of this settlement? and, secondly, if he did, did he authorize the shares in the bank to be transferred into his name, or did he know they had been so transferred?

With regard to the acceptance of the trust, I think it clear that he did accept it. The evidence is both documentary and verbal. As to the documentary evidence, it is not derived from the marriage settlement itself, for the marriage settlement is not executed by any of the trustees, but in the month of March following (1856)

(1) 15 Beav. 84.

there is a transfer by Mrs. *Fyfe*, as executrix of one *Bogle*, to the four trustees of the settlement, *Neilson*, *Hall*, *Welch*, and the Appellant, of certain *Glasgow* and *South Western* railway stock, and the transferees are described as "trustees nominated under and by virtue of the said ante-nuptial contract of marriage," and the Appellant and his co-trustees agree in that capacity to take the shares. This deed is signed by the Appellant, and his signature is witnessed by *Wm. M'Clure*, the law agent of the trust. This alone would seem to me to be conclusive. There is, however, the further written evidence of a dividend warrant of the 7th of August, 1856, running thus: "Pay to Mrs. *Fyfe*, or bearer, £9 2*s*., being dividend on thirty shares of the *City of Glasgow Bank* standing in the name of trustees for Mr. and Mrs. *Fyfe*, under marriage contract." This is signed by the Appellant and his co-trustees, each adding the word "trustee" to his name. There is further the letter of the 20th of February, 1868, written to Mr. *M'Clure* at *Greenock* by the Appellant from *Liverpool*. Mr. *M'Clure* had called a meeting of the trustees upon the death of Mr. *Fyfe*. The Appellant writes, "Dear Sir,—I am very sorry to hear from Mr. *Fyfe's* son of the death of his father. He says you wish to have a meeting of the trustees under the marriage settlement to-morrow. I regret, however, that I cannot go north at present."

With regard to the parol evidence, I need not go beyond that of Mr. *Ker* himself. He nowhere says that he did not accept the trust. He was a merchant at *Greenock*, and the agent there of the *City of Glasgow* bank. He must have known perfectly well the meaning of the dividend warrant, and all he says about it is "I did not know that I was registered as the owner along with my co-trustees of these shares. I did not know that my individual name was there, but I knew that the thirty shares were registered in the names of Mr. and Mrs. *Fyfe's* trustees. I signed the warrant as one of Mr. and Mrs. *Fyfe's* trustees." Then he says, "After I removed to *Liverpool* I met the late Mr. *J. Welch*, and had a conversation with him about this marriage. He said to me: Now that *Fyfe* is dead there is no use of your being on the trust or of my being on it. We run no risk, but we may as well be off it. Write me a note on the subject. I have a very distinct recollection of writing to him to the effect that being away from

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Greenock, and being of no use to the trust, I begged to get my name removed." I need hardly say that this evidence is only consistent with the idea of the Appellant having been a trustee of the settlement.

I now come to the circumstances under which his name was placed on the register. It appears that this was done through Mr. *M'Clure*, who wrote to *Neilson*, one of the trustees, at *Glasgow*. *Neilson* is now dead, but his letter, dated the 10th of March, 1856, states that he had called at the *City Bank*, and expected to have the matter closed with him next day, having left the marriage contract at the bank. On the 12th of March, 1856, he writes thus: "*City Bank* New certificate in trustees' favour received." It is to be observed, that the bank stock having been included in the marriage settlement, it would become the duty of the trustees and of their legal agent to provide in some way for the perfecting of the title by the trustees to the stock, and for preventing any improper dealing with it by the original owner. Whether a transfer of the stock into the names of the trustees was the only way in which this could be done it is unnecessary to consider. It clearly was one of the ways, and the action of Mr. *M'Clure* in obtaining a transfer of the stock, if it was not sanctioned beforehand by the Appellant, might naturally be approved by him after he knew it. The dividend warrant, to which I have already referred, clearly shews that he did know it on the 7th of August, 1856, if not sooner, and he made no objection to it. His position as agent of the bank, would make him familiar with the meaning of the warrant, and he does not in his evidence deny that this was the case. He says, "From having signed the warrant, I conclude I must have known that there was *City of Glasgow Bank* stock under the marriage contract, but it had escaped my memory;" and further on he says, in the words I have already quoted, "I did not know that I was registered as the owner along with my co-trustees of these shares; I did not know that my individual name was there, but I knew that the thirty shares were registered in the names of Mr. and Mrs. *Fyfe's* trustees. I signed the warrant as one of Mr. and Mrs. *Fyfe's* trustees." He was a trustee, he signed as a trustee, and he knew that the shares were registered in the names of the trustees. My Lords, I can readily believe that

Mr. *Ker*, being at a distance from *Greenock*, may have subsequently forgotten much about this; but unfortunately the facts cannot be got over, and they appear to me clearly to establish both his trusteeship and his assent to the transfer of the stock into his name.

It was attempted to be argued that in 1868, after the death of Mr. *Fyfe*, the Appellant, by a letter of the 4th of April, 1868, resigned the trust, and that the other trustees afterwards acted as if they were the sole trustees. I should doubt whether the letter in question bore the formal character of a resignation of the trust, but even supposing it to have been a resignation, it was not in any manner intimated to or acted upon by the bank, and the case in that respect comes under the authority of the previous decisions of your Lordships. On the whole, I have to move your Lordships that the interlocutor appealed from be affirmed and the appeal dismissed with costs.

LORD HATHERLEY concurred.

LORD O'HAGAN:—

My Lords, this is a peculiarly hard case; but the decisions to which your Lordships have already arrived appear to me conclusively to establish the Appellant's liability.

It would be idle to repeat the full statement of all the facts which has been made by the Lord Chancellor. They result in this, that, although the settlement of Mr. *Fyfe* was not executed by the Appellant, he was named in it as a trustee, described himself as such under his own hand, acted as such in accepting the transfer of railway stock, and, by the dividend warrant of the 7th of August, 1856, at once demonstrated his knowledge that the bank shares had been vested in him and his co-trustees, adopted the acts by which they were vested, and assumed all the responsibility arising from the possession of them. That document seems decisive against him, unless he subsequently got rid of the responsibility of which it was the evidence. But he never got rid of it. He never resigned the trust which he had accepted. He seems to have desired to resign it and to have suggested his resignation, but the desire and suggestion were not carried into effect; and the correspondence shews, in its reference to the proposed meeting

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of the trustees and otherwise, that he did not regard himself as relieved from the trust. Even if there had been a resignation, it was not, confessedly, communicated to the bank: it was not used to remove his name from the register, so that creditors and shareholders might know of the loss of such security as it had afforded them; and it would have been ineffectual to nullify that security. I do not rely on the effect of his position as agent at *Greenock*, which appears to have been regarded in the Court of Session as strengthening the case against him; but, on the grounds that he accepted the trust and adopted the transfer, and by no subsequent act denuded himself of the liability which they imposed upon him, I feel reluctantly obliged to concur in the proposal of my noble and learned friend.

LORD SELBORNE and LORD GORDON concurred.

Interlocutor appealed against affirmed; and appeal dismissed, with costs.

Lords' Journals, 20th May, 1879.

Agent for Appellant: *Andrew Beveridge.*
Agents for Respondents: *Martin & Leslie.*

[HOUSE OF LORDS.]

H. L. (Sc.)
1879
July 1.

CUNINGHAME . . . . . APPELLANT;

CITY OF GLASGOW BANK AND LIQUIDATORS . . . . . } RESPONDENTS.

EARL EGLINTON AND OTHERS (TRUSTEES) . RESPONDENTS.

Company—Winding-up—Approval of Purchase of Stock by Trustee—Antecedent Authority to place Name on Register followed by subsequent Recognition—Liability in solidum, not pro ratâ parte only.

A., one of five trustees appointed under a marriage contract, signed with his co-trustees a note approving the purchase of stock in a joint stock banking company of unlimited liability. By the authority of the law agent of the trustees, acting on the note of approval, all the names of the trustees appeared in the transfers as accepting the stock, and in the register of members of the company. *A.* did not sign the transfers, but he signed a subsequent letter to the company authorizing the payment of dividends. The company was wound up, and *A.* and his co-trustees were placed on the list of contributories as personally and individually liable for calls. In a petition at the instance of *A.* for rectification of the register and list of contributories:—

Held, affirming the decision of the Court below, that *A.* had authorized his name to be placed on the register. That the trustees were liable *in solidum* for the whole of the stock, and not *pro ratâ parte* for one-fifth part only.

Andrew Buchanan's Case in *Lumsden* v. *Buchanan* (4 Macq. 950; Court Sess. Cas. 3rd Series, vol. iii. p. 89) explained. See Lord *Selborne's* opinion.

APPEAL from an interlocutor dated the 21st of February, 1879, of the Court of Session, refusing a petition at the instance of the Appellant *John Charles Cuninghame*, and another, to have the register of the *City of Glasgow Bank* and the list of contributories rectified by the deletion of the Petitioners' names therefrom. The Appellant and four other persons appeared on the bank register as holders of £1450 stock as the trustees under the marriage contract of a Mr. and Mrs. *Cuninghame*. Two questions were raised in this appeal, (1.) whether the Appellant had authorized his name to be placed on the register of members, and if that question was answered in the affirmative; (2.) whether the personal liability attaching to the Appellant along with the other four trustees, is *in solidum* for the whole £1450, or only *pro ratâ parte* for one-fifth thereof. The second question was abandoned

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by the Appellant at the Bar. The facts are sufficiently set out in the opinion of the Lord Chancellor.

Mr. *Herschell*, Q.C., and Mr. *Chitty*, Q.C., were heard for the Appellant. They cited *Dr. Andrew Buchanan's Case*, in *Lumsden* v. *Buchanan* (1).

Mr. *E. E. Kay*, Q.C., Mr. *Benjamin*, Q.C., Mr. *Davey*, Q.C., and Mr. *Asher*, appeared for the Respondents, the liquidators.

The Lord Advocate (Rt. Hon. *W. Watson*), and Mr. *John Pearson*, Q.C., appeared for the Respondents, the trustees.

At the conclusion of the arguments on behalf of the Appellant, the Law Peers delivered the following opinions:—

EARL CAIRNS, L.C.:—

My Lords, it must be perfectly obvious to your Lordships, and must almost, I think, have been apprehended by the parties at the Bar themselves, that the principles on which this House has proceeded in the former cases connected with this bank completely dispose of the present appeal. Indeed, the facts of the present case are, in my judgment, less favourable to the Appellant than the facts in many of those previous cases were (2).

It is only necessary that I should remind your Lordships that there being five trustees, as to whose appointment and whose consent to act there is no question, in the year 1875, certain trust funds belonging to the marriage settlement of Mr. and Mrs. *Cuninghame* fell to be invested. The spouses desired that a certain portion of those trust funds should be invested in bank stock of the *City of Glasgow Bank*, and a request for that purpose was signed on the 6th of August, 1875, by Mr. and Mrs. *Cuninghame*. It is addressed to the five trustees; it states that a sum of £12,100 of the trust funds is to be re-invested, and it requests the trustees in these words, that "you will authorize the same to be re-invested in stock of the following banks in your own names as trustees, at the price of the day," and among other investments mentioned, is "*The City of Glasgow Bank*, £1450 stock."

(1) Court of Sess. Cas. 3rd Series, vol. ii. pp. 717, 723; 4 Macq. 950; see Lord *Selborne's* opinion *post*, p. 612.

(2) *Ante*, p. 547.

Now, that being a clear and distinct request to make the purchase in their own names, it is answered by the five trustees all signing in this way:—"We hereby sanction and approve the above investments."

That being the request, and that being the answer, it is stated among the admissions, "that Mr. *Thomas Strong*, writer to the signet, *Edinburgh*, was the duly appointed law agent of the trustees;" that the bank stock was purchased, and that he (*Strong*) conducted the arrangements for the transfer of the bank stock; and it is stated that he "acted in the matter under the instructions and letter mentioned in the foregoing article," the letter and instructions being what I have already read, passing between the spouses and the trustees. Then it is stated that the "transfers were sent to the bank by Mr. *Strong*, acting as the law agent of the trustees, and under the instructions and letter before mentioned on the 11th of December, 1875, for the purpose of being registered in the books of the bank."

My Lords, I stop there for the purpose of saying that in law that was of course just the same thing as if those five trustees had themselves in their own persons walked to the bank with the transfers and had there actually registered them, themselves in their own names. The letter which *Strong* sent with the transfers is this: "Referring to the latter part of your letter of the 8th, I now enclose three transfers of £1450 stock (£450, £500, and £500), signed by a majority and quorum of the marriage-contract trustees of Mr. and Mrs. *John Cuninghame* (the purchasers), conform to accompanying printed schedule."

Now, turning to the transfer itself which was handed in, it is in the usual form, and I have only to read a few lines from the central part—the trustees, the Earl of *Eglinton*, *John Charles Cuninghame*, *William Blair*, *Frederick Blair*, and *Montgomerie*, "by acceptance hereof, being in terms of the contract of co-partnership of said bank, subject to all the articles and regulations of the said company in the same manner as if they had subscribed the said contract"—that is the contract with the bank. It does not say that they have become subject to the conditions of the co-partnership by their executing the transfer, but by their acceptance of the transfer which was made to them. That acceptance

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Earl Cairns, L.C.

may be in many ways besides the execution of a deed. The deed, we find, was executed by a quorum of the trustees, but, as I said, it was accepted by the whole five through their act in taking it as their deed, their instrument of title, and asking the bank to act upon it by transferring the shares into their own names.

That being what was done towards the bank, and that instrument having been sent in, stating that they accepted this stock "subject to all the articles and regulations of the said company in the same manner as if they had subscribed the said contract," let us see what the articles of the company in fact say—Articles 37 and 38 are referred to—Article 37 says, "Where the shares of any partner are transferred, conveyed, or sold, in terms of the above articles, and that either by the partners or directors, the deed of transference thereof shall be prepared by such person as the ordinary directors may appoint at the head office in *Glasgow*, in such form and terms as the said directors may from time to time appoint." Then the 38th article says: "The said deed of transference, as also every assignment of shares in security, or *mortis causâ*, and confirmations thereof by right of succession, shall, after being completed, be recorded in a book to be kept for that purpose." I stop there for the purpose of saying that I do not read these words "after being completed" as meaning of necessity after being executed by every transferee. It may be completed as between the transferor and the transferee by the execution of the transferor if the transferor does not require more to be done, if he is satisfied that the transferee has accepted and chooses to rest upon the rights which will follow from that acceptance. The article then continues: "shall be recorded in a book to be kept for that purpose, and such deeds, transference, assignments, and confirmations shall be delivered or returned to those in right of the same, after having marked thereon a certificate of the registration thereof; and it is hereby declared that the production of such writings to the said manager or ordinary directors, for the purpose of registration, shall, *ipso facto*, infer" (that is, infer towards the bank, not towards the transferor; he and the tranferee had settled between themselves before: it means infer towards the bank) "the acceptance of the capital stock therein specified, and the liabilities of the parties having right to the same as partners of the company."

I have pointed out to your Lordships that by sending in the transfer those who sent it in agreed to take the shares according to whatever were the provisions of the contract of copartnery, and this, which I have read, was one of them.

Now, my Lords, to that I will only add that, after this was done, I find this further document executed by four of the trustees, including the present Appellant. It is dated the 13th of December, 1875, and it is addressed to the secretary of the *City of Glasgow Bank:*

Sir,—With reference to the sum of £1450 of the capital stock of the *City of Glasgow Bank, standing in our names* as trustees under the contract of marriage between *John Cuninghame*, Esq., residing at the *Pavilion, Ardrossan*, in the county of *Ayr*, and Mrs. *Mary Blair*, or *Cuninghame*, dated 21st of April, 1873, we hereby request that, until further instructions, the dividend warrants on said stock may be made payable to" Mrs. *Cuninghame.*

My Lords, I have never seen in my recollection of joint stock cases, a case in which the *catena* of the title was so complete in every substantial point as it is here. The only thing that can be suggested as not being present is the formal imposition of a signature by the Appellant to the deed of transfer. That, my Lords, seems to me to be the purest form, the merest ceremony, and the want of it can have no substantial operation whatever in the present case. You have from a time antecedent to the purchase of the stock the declared intention, consent, and authority of every trustee to buy this stock and to have it placed in their own names. You have every step taken which was thought necessary by the bank, or by any person else, to procure the stock to be transferred into their names—you have it actually transferred in the books of the bank into their names—and you have under their own hand an immediate recognition by the present Appellant and his co-trustees that it was so transferred, and you have them at once entering into the enjoyment of the property transferred by drawing dividends.

My Lords, that really is a case which is not susceptible of argument. I need not go into the other part of the case as it was not relied upon at the Bar. I have only to submit to your Lordships that the appeal should be dismissed with costs.

LORD HATHERLEY concurred.

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LORD O'HAGAN:—

My Lords, unless we are prepared to ignore a series of decisions unanimously pronounced by the Court of Session, and unanimously affirmed by your Lordships' House, we cannot hesitate to adopt the proposal of my noble and learned friend on the woolsack.

This is, in my opinion, a stronger case than most of those with which we have had heretofore to deal. We have here an antecedent sanction and authority, which has not merely a general reference to what was to be done, but is a distinct approval of an investment, which is expressly stated and clearly described. That appears to me to involve in it an authority for the investment, with all its incidents, one of which was to put the investors on the register. That antecedent authority was followed by subsequent recognition in the letter of mandate which has been read by my noble and learned friend on the woolsack, at once establishing the Appellant's full knowledge of the transaction which had been so antecedently authorized—and the application of it for the purposes of the trust. Under those circumstances, I am clearly of opinion that we have no alternative but to affirm the judgment of the Court below.

LORD SELBORNE:—

My Lords, I am also of the same opinion.

I should like to make one observation, and one only, upon the case which has been relied upon in the argument, namely, the case of *Lumsden* v. *Buchanan* (1), so far as regards Dr. *Andrew Buchanan*. It is not at all necessary to consider to what extent and for what purposes that ought to be regarded as an authority which this House would hold to be binding upon itself, in a case similar in its circumstances; but it may be useful to guard against the citation of that case as an authority for purposes to which it is certainly inapplicable, and I therefore think it worth while to take notice of what I suppose to have been the ground of that decision. The House, I suppose, considered that every entry upon a register ought to have reference to some title; that the antecedent title there was shewn to be that of the other

(1) 4 Macq. 950; Court Sess. Cas. 3rd Series, vol. ii. p. 723.

trustees, not including, either by name, or by reference, or by any collective form of designation, Dr. *Andrew Buchanan;* and probably the House may have thought that there might have been too much confusion and uncertainty and misconception as to the effect of the form of registration adopted, to make it safe to attribute it to any other title than that which was actually produced, a title not extending to Dr. *Andrew Buchanan.* That I have always supposed to be the ground of the decision—the House did not think there was any transfer intended; and it could not possibly have thought, on the facts before it, that the deed of accession, by which the other trustees agreed to take the shares from the company, was subscribed by or on behalf of Dr. *Andrew Buchanan.* Under these circumstances the House seems to have disregarded the registry, although it was perfectly well known to Dr. *Andrew Buchanan* and acted upon by him, because they could not connect it with the antecedent title.

LORD BLACKBURN:—

My Lords, I am entirely of the same opinion. I take it that under the Act of 1862, when a name is entered upon the register, a person entitled as a shareholder is *primâ facie,* until the contrary is proved, to be taken as a shareholder. Sect. 23 of the same Act says, "that every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company." The question, therefore, comes to be, whether it is shewn that Mr. *Cuninghame* (the Appellant in this case), had agreed to become a member of this company. In the case of *Lumsden* v. *Buchanan* (1), as I understand the facts to have been there, the House of Lords, although there is scarcely a word said in their judgment about the case of Dr. *Andrew Buchanan,* seem to have come to the conclusion that he was not shewn, as a matter of fact, to have intended to become a shareholder. If so, that may have been quite right on the facts of the case, or it may even have been a mistake upon the facts of that case; but it does not govern another case where the facts are quite different.

Here Mr. *Cuninghame* agreed to become a shareholder in every

(1) 4 Macq. 950; Court Sess. Cas. 3rd Series, vol. ii. p. 723.

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way in which any man can agree. He, under his own hand, authorized the buying of the shares in his name, by his agent, who had authority to act in his behalf; he caused the documents to be drawn up in such a way that the shares would be transferred into his name by his agent. Again, he wrote to the company, saying that only three, which was a quorum, had signed the transfer; and asking them, though not in these precise words, to register the names of the five trustees, inasmuch as a quorum had signed. Immediately after that, he with his own hand wrote a letter, saying that the shares were now standing in his name, and asking that the dividend upon them should be paid in a certain way. Stronger evidence that he directed his name to be entered upon the register and agreed to be a shareholder I cannot conceive. If the learned counsel for the Appellant had been able to shew that there was any principle of the law of *Scotland*, or of the general law, which said that a man cannot be held to have become a shareholder in a company without signing his name to a transfer, that would have been another affair; but there is no pretence for saying that there is any such rule of law, and I think that the terms of the 38th section of the articles of the *City of Glasgow Bank* do not mean that. Even if they did, I do not think it would lie in the mouth of any one, after the transfer had been made and had been acted upon for some time, and after the creditors had had an opportunity of seeing it, to say that it should have the effect of controlling the Act of Parliament.

LORD GORDON concurred.

Interlocutor appealed against affirmed; and appeal dismissed, with costs.

Lords' Journals, 1st July, 1879.

Agent for Appellant: *William Robertson.*
Agents for Respondents, the Liquidators: *Martin & Leslie.*
Agent for Respondents, the Trustees: *Preston Karslake.*

[HOUSE OF LORDS.]

TENNENT . . . . . APPELLANT; H. L. (Sc.)

THE CITY OF GLASGOW BANK AND LIQUIDATORS . . . . . } RESPONDENTS. 1879 May 20.

Company—Stoppage—Action to rescind Contract on the Ground of Fraud—Commencement of Winding-up—Companies Act, 1862, *ss.* 18, 38, 84, 130.

Since 1873 *A.* had appeared on the register of a joint stock banking company as the holder of £6000 of stock. On the 2nd of October, 1878, the bank stopped payment. On the 5th of October the directors issued circulars summoning an extraordinary general meeting to pass a resolution to wind up the company. On the 18th of October a report made by independent investigators was sent to all the shareholders, which shewed that the insolvency of the company was of such an overwhelming character that large calls would have to be made to meet its liabilities. On the 21st of October *A.* raised an action for reduction of his contract to take stock, on the ground that he was induced to purchase by the fraudulent misrepresentation of the directors. The summons in this action was served on the company on the same day. On the 22nd of October an extraordinary resolution to wind up the company voluntarily was passed. *A.* was put on the list of contributories. In a petition by *A.* for rectification of the register and list of contributories based on the action of the 21st of October:—

Held, affirming the decision of the Court below, that the rights of innocent third parties had intervened; and that *A.*'s action for reduction of his contract was too late to exempt him from liability.

APPEAL from an interlocutor of the Court of Session, refusing to remove the name of the Appellant, Mr. *Hugh Tennent*, from the list of contributories and from the register of the *City of Glasgow Bank*. The bank was established in 1839.

The original capital was £750,000, divided into shares of £10 each. In November, 1857, the bank temporarily stopped payment for a short period. In 1858 the shares were converted into stock; and in 1873 additional capital was created, making the total capital of the bank £100,000. By the articles of co-partnership the shareholders' liability was unlimited, and the directors had power to purchase the shares of the bank (clause 32), and no one not a director was entitled to examine the books of the com-

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pany (clause 44). In 1862 the bank was registered under the *Companies Act* of that year.

Since 1873 the Appellant's name has appeared on the register of shareholders as the holder of £6000 of stock. He acquired this stock at three different times, namely, in December, 1872, from a Mr. *Thomas Matthew*, £2500 of stock at the price of 207 per cent.; in July, from a Mr. *Dugald Bell*, another £2500 of stock at 212 per cent.; and on the 21st of August he took directly from the bank £1000 of new stock, which was then created, at £200 per cent. For this stock Mr. *Tennent* was registered the owner, and stock certificates certifying this had been done were sent to him by the bank. The two transfers were executed by *Matthew* and *Bell* "in trust;" and it was alleged they held the stock as trustees for the bank.

Previous to October, 1878, the Appellant took no steps to relieve himself of these three contracts.

On the 2nd of October, 1878, the bank suspended payment, and its stoppage on account of its insolvency was notorious throughout the *United Kingdom*.

On the 5th of October the directors, by means of circulars and advertisements, gave notice of an extraordinary general meeting to be held on the 22nd of October with a view to wind up the bank.

On the 18th of October a report on the state of the bank's affairs, which had been obtained from independent investigators, was sent to all the shareholders, and was published in the newspapers on the 19th of October. This report disclosed, what the directors had known before, that the bank as a corporation was irretrievably insolvent, and could only pay its debts by making large calls.

On the 21st of October the Appellant raised in the Court of Session an action against the *City of Glasgow Bank*, and also against *Matthew* and *Bell*, concluding for reduction of the transfers, entries in the bank books and stock certificates in his favour as holder of the above stock on the ground of fraud. He reserved right of action for the price paid for the stock. The summons in this action was served on the bank on the same day, the 21st of October, which was one day before the passing of the resolution to wind up voluntarily.

On the 22nd of October an extraordinary resolution was passed

to wind up the bank voluntarily; and liquidators were appointed. Subsequently a list of contributories was made up, in which the Appellant's name was placed. On the 27th of November the voluntary liquidation was placed under the supervision of the Court in terms of the *Companies Acts*, 1862 and 1867.

On the 8th of December the Appellant raised a supplementary action of declarator, and damages against the liquidators and the bank for, *inter alia*, removal of his name from the lists.

The liquidators having refused to remove the Appellant's name from the list of contributories, he, on the 13th of December, presented a petition to the Court of Session for rectification of the bank register, the removal of his name from the list; and to stay proceedings for enforcement of calls.

In the action for reduction and in the petition the Appellant substantially averred that he was induced to become a partner of the bank and to purchase all the three parcels of stock by the false and fraudulent representations, and the fraudulent concealment made by the *City of Glasgow Bank*. That at and prior to the time of the respective dates of the transfers and purchases, the bank was in a state of absolute and hopeless insolvency, the debts of the company enormously exceeding its assets; but the bank regularly issued reports or balance-sheets falsely stating that it was in a condition of great prosperity, and fraudulently concealed its true condition from the Appellant. That the shares transferred by *James Matthew* and *Dugald Bell*, though nominally held by them, truly belonged to the bank itself; and it was for the bank that they held them in trust and transferred them to the Appellant. Also that it was the practice of the directors, for the purpose of concealing the fact that the bank was a large holder of its own stock to take transfers for behoof of the bank in favour of *Matthew* and *Bell*, and that these transfers were expressed to be taken "in trust," but the trust for the bank was not disclosed on the face of the transfers, or of the stock ledger. The Appellant further alleged that he had no means of discovering the fraud practised on him by the bank until its stoppage.

The liquidators contended that, whatever might have been the Appellant's rights had he taken steps to avoid his contract while the *City of Glasgow Bank* was a going concern, he could not be

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allowed to do so when he took no steps to avoid the contract till after the known irretrievable insolvency of the bank; the rights of innocent third parties had intervened; and *restitutio in integrum* was no longer possible.

On the 22nd of January, 1879, the First Division of the Court of Session, refusing the prayer of the petition, held that the action raised on the 21st of October came too late after the bank had stopped payment and had declared its insolvency (1).

On appeal,

April 4. Mr. *Southgate*, Q.C., Mr. *Macnaghten*, and Mr. *Whitehouse*, for the Appellant, contended that there was no question as to the facts, and it was not disputed that the Appellant was induced to purchase the shares by fraud, the only question to decide was simply the time when the action could be successfully brought for rescission of the contract. They maintained that a person induced by the fraud of a company to become a member of that company was entitled to be relieved from the contract of membership, although the company might be in liquidation, provided he had rescinded the contract, and rescinded his shares, on discovering the fraud, and had actually commenced legal proceedings to enforce the rescission of the contract before the commencement of the winding-up. And here the Appellant at the earliest moment after the discovery of the fraud practised on him, took action to rescind the contract, and this he did before the commencement of the winding-up, which commenced at the date of the resolution. From the passing of the resolution only the right of creditors accrued as against equally innocent shareholders.

[They relied on *In re Reese River Company, Smith's Case* (2); they also commented on *Oakes* v. *Turquand* (3); *In re Smith Knight, & Co., Weston's Case* (4); opinion of Lord Justice *Brett* in *Stone* v. *City and County Bank* (5); *Webb* v. *Whiffin* (6); *Henderson* v. *Lacon* (7); *Henderson* v. *Royal British Bank* (8),

(1) Scot. Law Rep. vol. xvi. p. 238; Court Sess. Cas. 4th Series, vol. vi. p. 554.
(2) Law Rep. 4 H. L. 64; Law Rep. 2 Ch. 604.
(3) Law Rep. 2 H. L. 325.
(4) Law Rep. 4 Ch. 20.
(5) 3 C. P. D. 282, p. 309.
(6) Law Rep. 5 H. L. 711, at p. 734.
(7) Law Rep. 5 Eq. 249.
(8) 7 E. & B. 356, at p. 364; 26 L. J. (Q.B.) 112.

which did not apply here; *In re Whitehouse & Co.* (1); *Addie* v. *Western Bank of Scotland* (2): *Re Cleveland Iron Company, Ex parte Stevenson* (3); *Companies Act*, 1862, ss. 18, 38, 129, 130, 131.]

Mr. *E. E. Kay*, Q.C., Mr. *Benjamin*, Q.C., Mr. *Davey*, Q.C., and *Kinnear*, for the Respondents, contended that it was undoubtedly the law in *England* and *Scotland* that a contract induced by fraud was not void but voidable, and the rights which exist in favour of the defrauded party to avoid the contract might be defeated by (1.) his own delay in exercising the right; (2.) the intervention of the rights of innocent third parties, as here; and (3.) such a change of circumstances as render it impossible to restore matters to their former position: see *Clarke* v. *Dickson* (4); *Oakes* v. *Turquand* (5); *Reese River Company* v. *Smith* (6). *Oakes* v. *Turquand* did not lay down the rule that the winding-up order, or the presentation of a petition to wind up, was the *punctum temporis* at which the rights of creditors intervene; on the contrary, in that case *Henderson* v. *Royal British Bank* (7) was expressly adopted, in which Lord *Campbell* said it would be monstrous if a person became a partner, and having so remained until the stoppage could afterwards repudiate liability; he also said that the rights of creditors became inchoate when the bank stopped payment; and that was the opinion of all the conferring Judges of the Common Law Courts. It could not be denied that at least on the 6th of October it was in the power of any creditor to file a petition for judicial winding-up, and prevent that which was now attempted. The circular convening the meeting was an acknowledgment in the words of the 79th section of the *Companies Act*, 1862, that the company was unable to pay its debts. The creditors had not lost their rights because they held their hand on the assurance of the directors.

[They cited also *Kent* v. *Freehold Land and Brickmaking Company* (8); *Allin's Case* (9).]

(1) 9 Ch. D. 595, 599.
(2) Law Rep. 1 H. L., Sc. 145.
(3) 16 W. R. 95.
(4) E. B. & E. 148.
(5) Law Rep. 2 H. L. 325.
(6) Law Rep. 4 H. L. 64.
(7) 7 E. & B. 356; 26 L. J. (Q.B.) 113.
(8) Law Rep. 3 Ch. 493.
(9) Law Rep. 16 Eq. 449, at pp. 454, 455.

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Mr. *Southgate*, Q.C., in reply.

May 20. EARL CAIRNS, L.C.:—

My Lords, the facts of this case lie in a very narrow compass. The Appellant is the holder of £6000 stock in the bank; £5000 of this stock he bought in the years 1872 and 1873 from trustees who held it for the bank, and £1000 was allotted to him by the bank in 1873. After the bank stopped payment, as your Lordships have heard in the other cases, the directors employed accountants to make a report on the affairs of the bank. This report was made on the 18th of October, 1878, and was on that evening sent by post to the shareholders. The Appellant received his copy of the report on the 19th of October, and thereupon he discovered, as he alleges, that he had been induced to take the stock in the bank by fraudulent misrepresentations of the directors. The 20th of October was a Sunday, and on the 21st of October he commenced an action in the Court of Session for reduction of his contract as a shareholder with the bank. The resolutions to wind up the company voluntarily were passed on the following day, the 22nd of October; and on the 13th of December, the name of the Appellant having been put by the liquidators on the list of contributories, he presented a petition to have his name removed, which petition was refused, and hence the present appeal.

My Lords, I ought to assume, and will assume for the present purpose, that whatever difficulties arising from lapse of time and other circumstances might, as between the Appellant and the bank, lie in the way of his succeeding in the action of reduction he has instituted, he would have been entitled, had the bank been a going concern, to have succeeded in the action. The question is, can he succeed in rescinding his contract after the bank has stopped payment?

The Lord President (1) states that the law upon this subject is contained in three propositions. In the first place, a contract induced by fraud is not void, but only voidable at the option of the party defrauded; secondly, this does not mean that the contract is void till ratified, but it means that the contract is valid till rescinded; and thirdly, the option to void the contract is barred

(1) Scotch Law Rep. vol. xvi. p. 241; Court Sess. Cas. 4th Series, vol. vi. p. 558.

where innocent third parties have, in reliance on the fraudulent contract, acquired rights which would be defeated by its rescission.

Upon the two first of these propositions there cannot, I should think, be any dispute, and none was raised in the argument at your Lordships' bar. Nor was there any dispute as to the principle of the third proposition. The only question was to its precise wording, and the extent and mode of its application.

The case of *Oakes* v. *Turquand* (1) in this House has established that it is too late, after winding-up has commenced, to rescind a contract for shares on the ground of fraud. This, no doubt, is on the grounds stated by the Lord President, that innocent third parties have acquired rights which would be defeated by the rescission. The case of *Oakes* v. *Turquand*, however, while it decided negatively that a contract could not be rescinded on the ground of fraud after a winding-up had commenced, did not decide affirmatively the converse proposition, that up to the time of the commencement of a winding-up a contract to take shares could be rescinded upon the ground of fraud. Whether it can or not be so rescinded up to that time must, I think, depend upon the particular circumstances of the case.

In an ordinary partnership, not formed on the joint stock principle, it is impossible, as a general rule, for a partner at any time to retire from or repudiate the partnership without satisfying, or remaining bound to satisfy, the liabilities of the partnership. He may have been induced by his copartners by fraud to enter into the partnership, and that may be a ground for relief against them, but it is no ground for getting rid of a liability to creditors. This is the case whether the partnership is a going concern, or whether it has stopped payment or become insolvent. In the case of a joint stock company, however, the shares are in their nature and creation transferable, and transferable without the consent of creditors, and a shareholder, so long as the company is a going concern, can, by transferring his shares, get rid of his liability to creditors, either immediately or after a certain interval. The assumption is that, while the company is a going concern, no creditor has any specific right to retain the individual liability of any particular shareholder.

(1) Law Rep. 2 H. L. 325.

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It is on the same or on a similar principle that, so long as the company is a going concern, a shareholder who has been induced to take up shares by the fraud of the company has a right to throw back his shares upon the company-without reference to any claims of creditors. He would have a right to transfer his shares without reference to creditors. The company, as a going concern, is assumed to be solvent, and able to meet its engagements, and to have a surplus, and the company being solvent, its duty to pay the repudiating shareholder what is due to him, and to take the shares off his hands, is an affair of the company and not of its creditors.

But if the company has become insolvent, and has stopped payment, then, even irrespective of winding-up, a wholly different state of things appears to me to arise. The assumption of new liabilities under such circumstances is an affair not of the company but of its creditors. The repudiation of shares which, while the company was solvent, would not or need not have inflicted any injury upon creditors must now of necessity inflict a serious injury on creditors. I should, therefore, be disposed in any case to hesitate before admitting that, after a company has become insolvent and stopped payment, whether a winding-up has commenced or not, a rescission of a contract to take shares could be permitted as against creditors.

But in the case before your Lordships the facts are extremely peculiar, and I do not think that your Lordships, in affirming the judgment of the Court of Session, will find it necessary to lay down any general rule extending beyond the particular facts of the present case. The bank stopped payment on the 2nd of October and never resumed business, its stoppage being caused by its insolvency. It is admitted that the directors knew at the time of the stoppage that the insolvency of the bank was irretrievable. On the 5th of October the directors convened an extraordinary general meeting of the shareholders by advertisement for the 22nd, for the purpose of considering, and, if thought fit, passing extraordinary resolutions under the *Companies Act* for the purpose of winding up the bank voluntarily by reason of its insolvency. These were steps taken by the directors of the bank as the agents and representatives of the shareholders, and there was imposed upon the shareholders whatever responsibility may fairly be inferred from the steps so taken. Now at this time, and for several days after,

indeed until the 21st of October, the Appellant was to all intents and purposes a shareholder in the bank, not having taken any steps to disaffirm his contract, and the directors during this time were and were acting as his agents.

I have already had occasion to point out to your Lordships in other cases what appeared to me to be the necessary consequence of the steps which the directors thus took. The bank having stopped payment, and its insolvency being well known, it was scarcely within the bounds of possibility that, if nothing had been done by the directors, the creditors, or some one creditor, should not, within a few days after the 2nd of October, have presented a petition for the winding-up of the bank, and with the presentation of such a petition the winding-up of the bank would have commenced, and the repudiation of any share would, according to the case of *Oakes* v. *Turquand* (1), have become impossible. It was the action of the directors, taken in the interest of the shareholders, including the Appellant, and taken under the authority of the 46th article of the deed of the company, which, by holding out to the body of creditors the prospect of a voluntary winding-up, stayed the hands of the creditors from proceeding to a compulsory winding-up, and in my opinion it became impossible, after the advertisement of the 5th of October, for the body of shareholders in the company, whose agents the directors were, to make any alteration in their status, whether by a transfer or by a repudiation of shares, which would affect the rights of creditors in the company.

This consideration alone seems to me to be sufficient to dispose of the present appeal, and I have to move your Lordships that the appeal be dismissed with costs.

LORD HATHERLEY, LORD SELBORNE, and LORD GORDON, concurred.

Interlocutor appealed against affirmed; and appeal dismissed, with costs.

Lords' Journals, 20th May, 1879.

Agent for Appellant: *J. McDiarmid.*
Agents for Respondents: *Martin & Leslie.*

(1) Law Rep. 2 H. L. 325.

[HOUSE OF LORDS.]

H. L. (Sc.) 1879 May 20.

NELSON MITCHELL . . . . . APPELLANT;

CITY OF GLASGOW BANK AND LIQUIDATORS . . . . . } RESPONDENTS.

Company—Refusal to register Sale of Stock after known Insolvency—Companies Act, 1862, *s.* 35—*Sale of Stock—Registered Proprietor not set forth—Statute* 30 *Vict. c.* 29 (*Leeman's Act*).

On the 28th and 30th of September, 1878, a shareholder in a joint stock banking company sold, through his broker in the usual course of business, on the *Glasgow* stock exchange, his shares for settling-day, the 16th of October. The name of the person in whose name the stock stood in the books of the company was not made known to the purchasers, nor were the shares marked by numbers, but the holders on the day of sale sent contract notes intimating the sale and purchase to their respective principals. On the 2nd of October the company suspended payment, and the directors knew that its insolvency was irretrievable. On the 5th of October an extraordinary meeting of the company's shareholders was summoned by circular for the 22nd, to pass a resolution to wind up the company voluntarily, on account of its insolvency. On the 11th of October the seller was informed that the company had been the purchasers, they having the power to purchase their own stock by their articles of copartnership. On the 15th of October the company refused to prepare a transfer of the stock to themselves; and on the 18th they refused to register a unilateral deed of transfer which was delivered to them by a notary public. On the 19th the shareholder presented a petition for rectification of the bank's register by the deletion of his name therefrom. On the 22nd of October the extraordinary resolution to wind up voluntarily was passed. The liquidators placed the shareholder's name on the list of contributories. In a question under sect. 35 of the *Companies Act*, 1862:—

Held, affirming the decision of the Court below, that it would have been improper for the directors under the circumstances to have registered the transfer on the 16th of October, and therefore that the shareholder's name was rightly included in the list of contributories.

Held, also, that it was unnecessary in this case to decide whether the contract of sale was null and void under the provisions of 30 Vict. c. 29.

APPEAL from an interlocutor of the Court of Session, refusing the prayer of a petition at the instance of the Appellant, Mr. *Nelson Mitchell*, of *Glasgow*, praying for the rectification of the register of members and list of contributories of the *City of Glasgow Bank*. The bank was registered, but not formed under the *Companies Act* of 1862 (1).

In September, 1878, Mr. *Nelson Mitchell* was admittedly a

(1) The articles of co-partnership are set out, *ante*, p. 340–344.

member of the *City of Glasgow Bank*, as the holder of £2500 stock (1), and his name appeared on the register of shareholders. Having resolved to sell his stock, he instructed Messrs. *Black & Robson*, brokers in *Glasgow*, to sell it. They accordingly effected the sale, the stock being sold in three lots, one lot of £1000 on the 28th, and two lots of £1000 and £500 on the 30th of September, all for settlement on the 16th of October. The purchasing brokers of all three lots were Messrs. *A. Reid & Co.*, and they purchased for the bank itself on the verbal instructions of the manager, given with the directors' authority, the bank having power under the articles of copartnership to purchase its own stock. The sale of the stock was made on the *Glasgow* stock exchange in the usual way. The brokers, Messrs. *Black & Robson*, entered the sales in their note books called "transaction books," giving the date, the quantity of stock sold, the name of the stock, the settling-day, the name of the purchaser's broker, and the rate of price at so much per £100. According to the practice of the stock exchange, this entry was initialed by an accredited clerk of the purchaser's brokers, Messrs. *Reid & Co.* In the "transaction book" of Messrs. *Reid & Co.* there were corresponding entries initialed by a partner of *Black & Robson*, the seller's brokers.

The name of the person in whose name the stock stood in the books of the bank was not mentioned to the buyer's brokers at the time of the sale; nor did the seller then know for whom the stock was purchased; nor was the stock distinguished by any number on the register of the bank. Immediately after the sale on the 28th and 30th of September, contract notes duly stamped under 41 Vict. c. 15, s. 26, intimating the purchase, were sent by Messrs. *Reid & Co.* to the manager of the bank; and similar notes intimating the sale were sent by Messrs. *Black* and *Robson* to the Appellant. On the 2nd of October the bank stopped payment, and the directors knew at the time that the insolvency of the bank was irretrievable. On the 5th the directors issued a circular calling the shareholders to an extraordinary meeting to consider a resolution (2) to wind up voluntarily, on the ground that the bank

(1) See statement as to alleged error in the admission, *post*, p. 627.

(2) *Companies Act*, 1862, sub-sect. 3 of sect. 129.

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could not continue its business by reason of its overwhelming liabilities. On the 11th of October the directors instructed the secretary to reply to all requests for transfer that the directors did not feel warranted to prepare a register and transfers of the bank stock. On the 15th of October advice of counsel was taken, and they concurred in thinking that the directors were not warranted to register any stock, or to take up any stock which brokers may have bought for the bank.

On the 10th or 11th of October the name of the seller of the stock was mentioned to the purchaser's brokers, and on the latter date the purchaser's broker, Messrs. *Reid & Co.*, wrote as follows to the seller's brokers, disclosing for the first time the name of the purchaser:

> Dear Sirs.—What we did in *City of Glasgow Bank* stock with you was on the instructions and for behoof of the bank itself. (2.) We hold no written authority. (3.) Our instructions were given verbally by *R. S. Stronach*, the manager. (4.) We intimated what was done by contract note to Mr. *Stronach* in the usual form. We requested the directors verbally on the 8th inst., and again by letter yesterday, to be furnished with the means to take up the stock for the bank as early as possible, and we have received a verbal communication from the secretary this day, "that the board of directors have got an opinion that they cannot interfere." We think it right to communicate this information to you at the earliest moment for your guidance.

On the 15th of October Messrs. *Black & Robson* wrote to the manager requesting him to prepare transfers of the appellant's stock and enclosed the stock certificates. On the same day the secretary replied, stating that in the present state of the bank affairs, the directors did not feel warranted to prepare or register any of the bank stock.

The directors' weekly meetings were on Thursdays, and the 17th October was a Thursday, the transfer therefore might have been issued on the 18th or a day or two afterwards if the bank officials had exercised unusual despatch.

On the 16th of October the Appellant executed a unilateral deed of transfer of the stock in favour of the bank; and having first tendered it to the purchaser's brokers, it was subsequently, on the 18th of October, tendered to the bank for registration by a notary public and delivered into the hands of the manager.

On the 19th of October the Appellant presented a petition to

the Court for the rectification of the register of members, by the deletion of his name therefrom, and by entering the *City of Glasgow Bank* as proprietor of the £2500 stock.

On the 22nd the shareholders resolved on a voluntary winding-up, and the liquidators placing the Appellant's name on the list of contributories, he obtained leave to add to his petition that the list of contributories might also be rectified by deleting therefrom his name.

ante 625.

The liquidators lodged answers, and a minute of admissions was agreed on by the parties which contained, *inter alia*, the above facts. The Respondents contended, first, that there was no valid or effectual contract for the sale of the stock, the provision of *Leeman's Act* (30 Vict. c. 29) not being complied with; secondly, that, having regard to the facts of the stoppage and insolvency of the bank, the officials of the bank were neither bound nor entitled to alter the register of members as required by the Appellant; and that, therefore, there was no default or unnecessary delay on their part, so as to bring the case within the 35th section of the *Companies Act*, 1862.

The First Division of the Court of Session on the 21st of December, 1878, decided both the above points in favour of the Respondents (1).

On appeal,

April 3. Mr. *Higgins*, Q.C., Mr. *Balfour*, and Mr. *James Bryce*, for the Appellant, contended; the first question was whether there was here a solid and effectual contract for the sale of this stock, considering the statute 30 Vict. c. 29; and the second, whether there was default on the part of the company in refusing to complete the transfer. If the second question was decided against them, then the first was immaterial as far as regards creditors, though in any question *inter socios* which might hereafter arise they might have the right to indemnify if it was held to be a proper transaction.

On the first point the words of the Act which applied to the case were: "Or where there is no such register of shares or stock by distinguishing numbers, then unless such contract, agreement, or

(1) Court Sess. Cas. 4th Series, vol. vi. p. 420; Scot. Law Rep. vol. xvi. p. 155.

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other token shall set forth the person or persons in whose name or names such shares, stock, or interest shall at the time of making such contract stand as the registered proprietor thereof in the books of such banking company."

Assuming that the Act required a contract, agreement, or token to be in writing, and held void any contract for the sale of stock except it were in writing, the Appellant had complied with the Act, for the contract notes were part of the agreement. The Respondents were not correct in saying that the advice note sent to a seller by his broker intimating the sale was not a compliance with the Act, and that such note was no part of the contract. Also the contract need not be on one document; several might constitute it. And it would be a compliance with the Act, if in some document the name of the holder of the shares was set forth: see *Leigh's* Digest of the Law of Contracts, 1878, pp. 264, 265, also *Gibson* v. *Holland* (1). It made no difference that they had not after the name of the vendor the accompanying words: "that the person so set forth is the person in whose name the stock stands." In the *Stamp Act*, 41 Vict. c. 15, s. 26, see also 33 & 34 Vict. c. 97, s. 69, the advice note was fixed upon as the essence of the transaction and as the most important note in the transaction, to bear the stamp duty; and the advice notes here ought therefore to be resorted to, to shew what the real transaction was.

Then, alternatively, if the Act did not require every contract to be in writing, according to the law of *England* and *Scotland* a valid contract might be effected for the sale of stock or shares in a bank without writing: *Humble* v. *Mitchell* (2); *Duncuft* v. *Albrecht* (3); *Bowlby* v. *Bell* (4). The verbal contract was made here the moment the broker called out on exchange that he accepted the stock of the selling broker.

The Act did not apply to this particular case; and ought not to be strained to make null and void a *bonâ fide* transaction, which the Legislature had never contemplated.

On the second point there was nothing in the stoppage to prevent the mere ministerial act required of the directors in registering the transfer.

(1) Law Rep. 1 C. P. 1, p. 5.
(2) 11 Ad. & Ell. 205.
(3) 12 Sim. 189.
(4) 3 Scott, C. B. 284.

The commencement of the winding-up was the event which fixed the register, and when a company had accepted a surrender—as this was in terms—perfectly *bonâ fide*, if the transaction was not completed before the winding-up, the seller, or the person who surrendered, could not be liable. The creditors could not object to the removal of the Appellant's name, for he would be still liable as a past member. And the contributories could not complain, as it was simply carrying out a contract which the directors had entered into in exercise of their powers. There was nothing which could prevent the Appellant from enforcing his contract with his *socii*, supposing the creditor's rights not prejudiced, as they were not.

[They also commented on in their printed papers: *Stair's* Instit., 4, 43, 4; *Erskine*, 4, 2, 20; *Bell's* Prin., sects. 89, 1338; *Alison* v. *Fraser* (1); *Allan* v. *Gilchrist* (2); *Forbes* v. *Caird* (3); *Dickson* on Evidence, vol. i., sects. 555–557; *Nation's Case* (4); *Shepherd's Case* (5)].

The Lords reserved judgment without calling upon Mr. *Kay*, Q.C., Mr. *Benjamin*, Q.C., Mr. *Davey*, Q.C., and Mr. *Kinnear*, who appeared for the Respondents.

The Appellant subsequently presented further petitions to the House, praying to be heard further by counsel as to, *inter alia*, a fact which had come to his knowledge after the argument.

On the 20th of May, Mr. *Higgins*, Q.C., by the indulgence of the House, was further heard; and stated that the admissions between the parties were erroneous in stating that the whole sum of £2500 was registered in the Appellant's name on the 2nd of October, whereas the transfers to the Appellant of £500, part of the said sum, were not registered or recorded till some days after the 2nd of October, the date of the stoppage.

Counsel for the Respondents agreeing to the proposed order, were not called upon to address the House.

(1) 1868; Court Sess. Cas. 3rd Series, vol. vii. p. 39.

(2) 1875; Court Ses. Cas. 4th Series, vol. ii. p. 587.

(3) 1877; Court Sess. Cas. 4th Series, vol. iv. p. 1141.

(4) Law Rep. 3 Eq. 77.

(5) Law Rep. 2 Eq. 564, and 2 Ch. 16.

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EARL CAIRNS, L.C. :—

My Lords, the Appellant in this case sold on the *Glasgow Stock Exchange* certain stock belonging to him in the *City of Glasgow Bank*. The sales were made on the 28th and 30th of September, 1878, the settling-day being the 16th of October. The brokers who bought, bought for the bank, and there is no doubt that the bank, who had authority to buy their own stock under their deed, were the purchasers. Before the settling-day came, the bank, as your Lordships know, stopped payment. On the 16th of October a deed of transfer of the stock was tendered by the Appellant to the bank, of course without any expectation of receiving from the bank the purchase-money for the stock; the bank refused to accept or register the transfer, and the name of the Appellant was put on the list of contributories.

Two questions were raised in the appeal, first, whether there was a valid contract for the sale of the stock having regard to the provisions of 30 Vict. c. 29; and, secondly, was the company in default for not accepting and registering the transfer? The Court of Session has decided both points against the Appellant.

My Lords, on the first point, viz., the effect of 30 Vict. c. 29, I have not been satisfied by the arguments of the Appellant, either during the first argument or during the further argument which has taken place to-day (20th May), that the decision of the Court of Session was erroneous; but it appears to me unnecessary to decide that question, because I have no doubt that on the second point this case is not materially distinguishable from those already decided by your Lordships, and that, for the same reasons which were given in them, it would have been improper for the bank to have accepted or registered the transfer on the 16th of October, and therefore that the name of the Appellant rightly remains upon the register and was rightly included on the list of contributories. I propose to move in this case that the appeal be dismissed with costs.

With regard to the suggestion now made that the admissions entered into between the parties are erroneous in stating that the whole sum of £2500 stock was registered in the Appellant's name on the 2nd of October, whereas the transfers to the Appellant of £500 part of the said sum were not registered or recorded until

some days after the 2nd of October, I express no opinion whatever as to what ought to be the consequence of that fact, if it be a fact; but your Lordships may perhaps be disposed to say that the dismissal of this appeal should not prejudice any application which the Appellant may make to the Court of Session on this score.

LORD HATHERLEY, LORD O'HAGAN, LORD SELBORNE, LORD BLACKBURN, and LORD GORDON, concurred.

Judgment:—Ordered and adjudged, *that the said interlocutor of the Lords of Session in Scotland, of the First Division, of the* 21*st of December*, 1878, *complained of in the said appeal, be, and the same is hereby affirmed, and that the said petition and appeal be, and the same is hereby dismissed this House, but without prejudice to any application which the Appellant may be advised to make to the Court of Session to reduce the amount of stock* (£2500) *in respect of which his name has been placed on the list of contributories on the ground now alleged in his petition to this House, presented on the* 19*th day of May instant, namely, that the transfers to the Appellant of* £500 *part of the said amount were not, on the* 2*nd of October*, 1878, *nor until some days afterwards, registered or recorded in the books of the company: And it is further ordered, that the Appellant do pay or cause to be paid to the said Respondents the costs incurred in respect of the said appeal.*

Lords' Journals, May 20, 1879.

Agents for Appellant: *Grahames, Wardlaw, & Currey.*
Agents for Respondents: *Martin & Leslie.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1879. July 1.

GILLESPIE AND PATERSON . . . . APPELLANTS;

CITY OF GLASGOW BANK AND LIQUIDATORS . . . . . } RESPONDENTS.

Company—Winding-up—Stock in the Names of Partners for themselves "and the Survivor for behoof of the Firm"—Trustees—Joint and several Liability.

For some years previous to 1878 *A.* and *B.* had carried on in partnership the business of law agents in *Edinburgh*. By contract of co-partnership, executed in August and October, 1878, *A.* and *B.* on the narrative that the former partnership had ceased, agreed to continue the same, and to assume *C.* as a partner on the terms, *inter alia*, that the new firm should continue under the firm name of *A.* and *B.*; that the bank account should be kept in the name of the firm; and that *A.* and *B.* should supply the necessary capital required in equal proportions, either by holding bank stock in the name of the firm, or by advancing the requisite funds. Prior to the execution of this contract, but with a view to the arrangements of the new firm, £1000 of stock of the *City of Glasgow Bank*, an unlimited joint stock company, was purchased by *A.* and *B.* who supplied the price in equal proportions. A transfer was taken in favour of *A.* & *B.*, "and the survivor of them for behoof of the firm" of *A.* & *B.* A similar entry appeared in the register of members.

C. was not aware of the terms of the contract, or a party to the transfer. The bank stopped payment, and the liquidators placed *A.* and *B.* individually on the list of contributories as holders of £1000 of stock as "trustee for the firm" of *A.* & *B.* In an application *inter alia* to vary the list by deleting the words "trustee for the firm" and to place *A.* and *B.* on the list as contributories each for a separate sum of £500:—

Held, affirming the decision of the Court below, that a trust was created for the benefit of the partnership, and that as trustees *A.* and *B.* were jointly and severally liable for all calls in respect of the £1000 of stock.

APPEAL against a portion of an interlocutor of the First Division of the Court of Session.

The only question involved in the appeal was whether the Appellants, *John Gillespie* and *Thomas Paterson*, writers to the signet in *Edinburgh*, were rightly entered in the list of contributories of the *City of Glasgow Bank* as joint holders of £1000 of stock standing in their names; or whether they were entitled to be entered as contributories each for a separate sum of £500.

In winding up the bank, the liquidators found, under date of the 12th of August, 1878, the following entry in the stock ledger and in the transfer register:—"*John Gillespie* and *Thomas Paterson*, and the survivor of them, for behoof of the firm of *Gillespie & Paterson*, W. S.;" and the stock was entered, "By stock purchased from *Alex Tod*, £1000." (1) The liquidators thereupon made the following entries in the list of contributories:—

No. on list.	Name.	Address.	Description.	In what character included.	Extent of interest.
1429	*Gillespie & Paterson.*	Writers to the *Signet, Edinburgh.*	The trustees for.	Holders of stock.	£1000.

No. on list.	Name.	Address.	Description.	In what character included.	Extent of interest.
1431	*John Gillespie.*	*Edinburgh.*	*W. S.*, trustee for *Gillespie & Paterson.*	Holders of stock.	£1000.

No. on list.	Name.	Address.	Description.	In what character included.	Extent of interest.
1602	*Paterson Thomas.*	*Edinburgh.*	Trustee for *Gillespie & Paterson.*	Holders of stock.	£1000.

The liquidators subsequently called upon the firm of *Gillespie & Paterson* and the Appellants each to make payment of a first call of £500 payable in respect of the £1000 stock.

A petition was then presented by *Gillespie & Paterson*, writers to the signet, *Edinburgh*, and by the Appellants, and *John Hamilton Gillespie*, the individual partners of the said firm of *Gillespie & Paterson*, and by the Appellants as individuals, praying the Court of Session to order the liquidators of the bank

(1) For wording of transfer, see *post*, p. 637.

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to delete from the list of contributories the firm name of the Petitioners, *Gillespie & Paterson;* and further, to delete from the said list the words "trustee for *Gillespie & Paterson*" in the description of the Petitioners, *John Gillespie* and *Thomas Paterson* respectively; and further to delete from the said list the sum of £1000, as the interest of *John Gillespie* and *Thomas Paterson* respectively, in the stock of the company, and to substitute the sum of £500 therefor. To this petition the liquidators lodged answers, and the following minute of admissions was agreed to by the parties:

(1.) That for eight years, ending on the 31st of July, 1878, the Petitioners, *John Gillespie* and *Thomas Paterson*, carried on the business of law-agents and conveyancers in *Edinburgh* as partners, under the firm of *Gillespie & Paterson.*

(2.) That during the subsistence of the said partnership the bank account of the firm with the *City of Glasgow Bank* was kept in the name of the Petitioner, *John Gillespie*, who was individually a shareholder of the bank to a considerable amount.

(3.) That by contract of copartnery executed by the Petitioners, *John Gillespie* and *Thomas Paterson*, on the 14th of August, 1878, and by the Petitioner, *John Hamilton Gillespie*, on the 1st of October, 1878, the said *John Gillespie* and *Thomas Paterson*, on the narrative that the former partnership had come to an end as at the 31st of July, 1878, agreed to continue the same, and to assume the said *John Hamilton Gillespie* as a partner, on the terms, *inter alia*, that the co-partnership should be continued under the firm of *Gillespie & Paterson;* that the bank account should be kept in the name of the firm; that the said *John Gillespie* and *Thomas Paterson* should supply the necessary capital in equal proportions, either by holding bank stock in the name of the firm, or by advancing the requisite funds; and that the said *John Hamilton Gillespie* should receive a certain percentage of the clear profits of the business, the remainder being divided equally between the said *John Gillespie* and *Thomas Paterson.*

(4.) That prior to the execution of the said contract of co-partnership, but with a view to the arrangements of the new firm, the £1000 stock in question was purchased by the said *John Gillespie* and *Thomas Paterson*, and the transfer taken in favour of themselves and the survivor for behoof of the firm. The said transfer is dated the 13th and 29th of July, 1878.

(5.) That the purchase price of the said stock (amounting to £2395 without stamp and transfer fee) was paid on the 26th of July, 1878, and was contributed in equal proportions by the said *John Gillespie* and *Thomas Paterson;* and the only dividend ever paid thereon (being the sum of £60 paid on the 1st of August, 1878) was carried to their credit in the books of the firm in the proportion of one-half to Mr. *Gillespie* and one-half to Mr. *Paterson.*

(6.) That the Petitioner, *John Hamilton Gillespie*, was not a party to and gave no authority for the purchase of the said stock, and was not aware of the terms of the transfer, or that the stock had been bought for behoof of the firm, until after the stopping of the bank.

The Court of Session, on the 27th of February, 1879, directed the liquidators to remove from the list of contributories of the bank the name of the partnership firm of *Gillespie & Paterson*, writers to the signet, but otherwise refused the prayer of the petition, holding that the Appellants must be regarded as a body of trustees, and that, as such, their liability is joint and several (1).

From the latter portion of this judgment the Appellants appealed.

The Lord Advocate (Rt. Hon. *W. Watson*), and Mr. *Chitty*, Q.C., for the Appellants, contended that they were not trustees, but joint holders, as individuals, of the stock for a certain specified purpose. That special purpose was to form a fund of credit for the new firm; but that did not give the firm the rights of a beneficiary. Nor was the stock an asset of the firm. It was inconsistent with the notion of a trust, that the alleged trustees should have the power at their pleasure of actually abolishing the supposed trust altogether (by withdrawing the money from the investment) and substituting for it the relation of lender and borrower between themselves, and the beneficiaries: this the Appellants were free to do. The words "for behoof of" did not necessarily import a trust, but might indicate an obligation, and that was all they were intended to do here. The Appellants were each put on the list for £1000, which was exactly the reverse of what ought to have been done. The Appellants, though both liable to an unlimited extent to the creditors of the bank fell to be dealt with in contribution, as if each were holder of one half of the total £1000 stock. Their further argument is sufficiently commented on by the Lords in their opinions.

[They relied on *Stair's* Inst. 1, 17, 20; *Erskine's* Inst. 3, 3, 74; *Erskine's* Prin. 3, 3, 29; *Bell's* Prin. ss. 51, 52; *Bell's* Com. (seventh ed.), vol. i. pp. 361–364.]

Mr. *E. E. Kay*, Q.C., Mr. *Benjamin*, Q.C., Mr. *Davey*, Q.C., and Mr. *Asher* (of the Scotch Bar), appeared for the Respondents, but were not called upon to address the House.

(1) Scot. Law Rep., vol. xvi. p. 473.

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The Law Peers delivered the following opinions:—

EARL CAIRNS, L.C.:—

My Lords, I should desire in the first place to direct your Lordships' attention to the form in which the list of contributories has been settled in the present case. In the first instance, when the liquidators settled the list of contributories, the firm of *Gillespie & Paterson* was entered upon that list as a firm, and as holding the sum of bank stock in question. That entry has been struck out, and there is no appeal upon that subject, therefore that is out of the question. But there remain two entries, in one of which Mr. *John Gillespie* is entered as the holder of £1000 bank stock as trustee for *Gillespie & Paterson*, and another entry in which Mr. *Thomas Paterson* is entered as holding £1000 bank stock as trustee for *Gillespie & Paterson*. It is not in controversy that, although there is a mention here of two sums which might at the first sight appear to be separate, they really are one and the same sum; and although perhaps in this country there would have been one entry comprising the two names, both *John Gillespie* and *Thomas Paterson*, as the holders of the sum, the same end is attained in *Scotland* by separate entries. There is not any controversy between the parties as to more than a sum of £1000 bank stock being charged against the two names that I have mentioned; but the real question, the question argued upon the appeal before your Lordships, is how those two persons (the Appellants) are to be charged with this sum of £1000 bank stock. The contest of the Appellants is that it is stock for which they are to be inserted as liable, each for one half, that is £500, and not as liable *in solidum*, each of them for the whole.

My Lords, that depends on the circumstances under which, and the purpose for which, this stock was acquired by these parties. The two Appellants had been in partnership, and the partnership was about to be re-constructed with the addition of a third partner, who is not before your Lordships, and is stated in the admissions, "prior to the execution of the contract of co-partnery, but with a view to the arrangements of the new firm, the £1000 stock in question was purchased by" the Appellants to be transferred on the day—in fact it was transferred a few days before—

the new contract of co-partnery was executed. Now, the way in which it was purchased was this. The vendor, the transferor, was *Alexander Tod*, and he transferred it to *Gillespie & Paterson* in these words: "I, *Alexander Tod*, *St. Mary's Mount, Peebles*, in consideration of the sum of £2395 sterling, now paid to me by *John Gillespie* and *Thomas Paterson*, both writers to the signet in *Edinburgh*, do hereby sell, assign, transfer, and make over to and in favour of the said *John Gillespie* and *Thomas Paterson*, and the survivor of them, for behoof of the firm of *Gillespie & Paterson*, writers to the signet, *Edinburgh*, £1000 sterling of the consolidated capital stock of the *City of Glasgow Bank Company*," and so on. It is not disputed that "the firm of *Gillespie & Paterson*" mentioned here means not the old firm in which Mr. *Gillespie* and Mr. *Paterson* alone were partners, but the new firm in which Mr. *Gillespie* and Mr. *Paterson* were partners with a third party. The transfer, therefore, is to the two, *Gillespie* and *Paterson*, "and the survivor of them, for behoof of the firm of *Gillespie & Paterson*."

Now, what is the meaning of those words, "for behoof of the firm of *Gillespie & Paterson*"? As I understand the condition of the argument on the part of the Appellants, it is this—if those words, "for behoof of the firm of *Gillespie & Paterson*," constitute a trust as we term it, that is to say, make the holders of the stock to hold it in trust for the firm, then it is admitted by the Appellants that there is no doubt that they hold it upon that joint account, and that they are properly inserted as liable *in solido* to be charged, each of them, with the whole of the £1000. If, on the other hand, there is no trust—if the property remains the property of *Gillespie & Paterson* without any trust—then the Appellants raise an argument as to the Scotch rule where property is held *pro indiviso*, or where an obligation is undertaken *pro indiviso*, and it would be necessary to consider how that rule of Scotch law should be applied.

The first question is, was there, or was there not, a trust created by these words? In order to determine that it would be necessary to look to the purpose for which this stock was bought, and the arrangement under which it was to be held. That, my Lords, is to be found in the contract of co-partnery which was executed a few days afterwards, but which must be taken to be part and

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parcel of the same transaction. The two partners, *Gillespie* and *Paterson*, agree to continue partners, "and to assume the said *John Hamilton Gillespie* as a partner, on the terms, *inter alia*, that the co-partnership should be continued under the firm of *Gillespie & Paterson;* that the bank account should be kept in name of the firm" (I may say it is admitted that the old firm had banked with the *City of Glasgow Bank*, and that the word "bank" here refers to the *City of Glasgow Bank*); "that the said *John Gillespie* and *Thomas Paterson* should supply the necessary capital in equal proportions, either by holding bank stock in name of the firm, or by advancing the requisite funds; and that the said *John Hamilton Gillespie* should receive a certain percentage of the clear profits of the business, the remainder being divided equally between the said *John Gillespie* and *Thomas Paterson*."

That, my Lords, exhausts the whole of the materials upon which your Lordships have to come to your decision as to the meaning of the words "for behoof of the firm," and the object for which those words were used. In the first place I must ask your Lordships to consider this question; suppose there was not an intention here of creating a trust for the firm, has any explanation whatever been given, has any plausible suggestion been made at the Bar, of the purpose for which it is stated that these two persons held the bank stock? They were to hold it so that it was to go to the survivor of them. If they were not holding it for the purpose of a trust, the only other way in which they could be holding it would be for themselves as individuals. If they held it for themselves as individuals, it is contended by the Appellants that they were interested equally, each to the extent of one half of the property. But if that were so, for what possible reason could it be suggested that there should be a destination of this property, in which on that hypothesis they were equally interested, so that it would go on to the death of one, not as to one half to his representatives and as to the other half to the survivor, but the whole to the survivor? My Lords, I am bound to say that there was not any suggestion made which appeared to me to have even a semblance of plausibility for such an arrangement. On the other hand if there was a trust, of course it would be most natural to provide that the two persons who were holding the stock for the

purpose of implementing and satisfying the trust, should hold it so that it would go to the survivor.

Now, my Lords, let us look at what the substance of the case was. The substance of the case was this: that there should be provided in one of two ways what we call capital, that is to say, available assets for the firm. This was to be done either by way of a supply of money or by a supply of proprietorship in stock of the bank at which the partnership banked, and which bank therefore would give facilities, no doubt, in credit for the purpose of the partnership. But an arrangement of the latter kind, in order to make it a practical and useful and real arrangement, must in some way or other give the partnership which was to be benefited some control over and some interest in that which was to be provided as the capital of the partnership, namely, the bank stock. It was not necessary that the partnership should be out and out the proprietors of the bank stock so that no other person should have any interest therein; but it was necessary that for the purpose of a partnership contract the partnership should have the first claim to have the purposes of a partnership contract satisfied with reference to that bank stock. It may well be that the two persons who bought the bank stock might at any time have come to the partnership and said, "We wish to use this bank stock for another purpose; we wish now to advance the requisite funds in money for the purpose of capital; here are the funds in money which are necessary for the capital, and we claim to take away the bank stock and dispose of it as we think proper." It might well be that when a dividend was declared upon the bank stock, the two holders of the stock might say to the partnership, "The bank stock is supplied for the purposes of the partnership, but we do not mean the partnership to have the dividends," and it might be that the partners would agree to that. It may be that they did agree to that; it was a matter for the partners to arrange amongst themselves. But after and apart from all subsidiary arrangements of that kind, there remains the substantial arrangement, which was, that the holding of the bank stock was to be either in the name of the firm or for behoof of the firm, which would be equivalent to that proprietorship and that interest in the stock which there would be if the stock stood in the name of the firm.

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My Lords, there is no magic, as was admitted at the Bar, in the use of the word "trust." There may be half-a-dozen words in the English language which would bring about the same result as the use of the word "trust," and it appears to me that words which say that one person holds property "on behalf of" or "for behoof of" another, are words which come up to and satisfy the idea of the word "trust," just as much as the word "trust" itself, if the circumstances of the case are consistent with that interpretation. Now here, my Lords, the circumstances of the case not only appear to me to be consistent with that interpretation, but to be absolutely inconsistent with any other interpretation. That being so, it appears to me that it is unnecessary to enter upon an examination of those authorities upon Scotch law as to an obligation *pro indiviso* or property held *pro indiviso*. I, therefore, upon the ground that it appears to me that there was here a trust created for the benefit of the partnership, move your Lordships to affirm the judgment of the Court below and to dismiss the appeal with costs.

LORD HATHERLEY:—

My Lords, I am of the same opinion.

We might in this case have had to inquire into the question as to what the exact effect of the first words used with reference to the interest of the Appellants is, whether or not the directing that the stock should go to the survivor of *Gillespie* and *Paterson* creates that sort of interest which was described by the Lord Advocate as an interest *pro indiviso*, and gives such a character of severence as would be similar to tenancy in common in this country, and would make each of the proprietors in the present case the proprietors of £500 instead of the two together being liable *in solido* for the £1000. If the matter stood there alone, and we had simply the words saying that the stock was transferred to and held by *Gillespie* and *Paterson* and the survivor of them, we should be obliged to come to a conclusion upon that portion of the case after considering the authority which has been cited from *Erskine's* Institutes and elsewhere. But the words afterwards superadded, namely, "for behoof of the firm of *Gillespie* and *Paterson*," must, I apprehend, have made everybody perfectly aware of what the real nature of the transaction was.

It was decided in *Muir's Case* (1) that it is no part of the duty of a creditor of a bank to ascertain what the exact nature of the trust may be on which some shareholders hold stock of the bank. He is told that certain parties hold a fund in trust, and we have now decided in *Muir's Case* (1), and in several cases which have followed it, that the entry that the property is held in trust amounts to a statement by the holder of it, "I am a shareholder;" it affirms the position of the trustee as a shareholder, but, for some purpose or other, connected more probably with the interest of the *cestui que trust* than of the creditors, it is thought fit to state upon the register that, although the shares which the shareholder in question holds are held by him absolutely, he does not hold them beneficially but for the benefit of somebody else, that being a matter with which the creditor has nothing to do. That was the principle laid down in *Muir's Case* (1). Therefore here the case is reduced simply to this point, whether or not the words "for behoof of" a given person or persons are equivalent to "in trust for." I have heard nothing that to my mind gives an intelligent explanation of the words which are here used, unless they are equivalent to "in trust for."

The difference between saying, This is a fund I put by in order to be ready at all times to fulfil an obligation I have entered into with certain persons, for whose behoof I have taken it, on the one hand, and an absolute direct trust on the other, is too shadowy for my mind. I take it that a person who has entered into such an engagement could not relieve himself of that engagement unless he preferred to adopt the other alternative provided for in the deed, namely, to find the money in some other way; in which case he would not have described this fund as held "for behoof of" the other parties. So long as it is held for their behoof it is held by the shareholder as the absolute owner of it as regards the creditors of the *City of Glasgow Bank*. As far as regards persons outside the *cestui que trust* it is held for his behoof. Whether you say you hold "for behoof of" some one, or you hold "on behalf of" some one, or you hold "in trust for" some one, there is no particular magic in the choice of words; all those words indicate that you are not beneficially the owner. You in effect

(1) *Ante*, p. 337.

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tell the creditors of the concern, As between you and me, I am the holder of the stock, but as between me and a third person with whom you have nothing to do, I am the holder of it for that person's benefit.

I apprehend, therefore, that this case cannot be distinguished from those which have already come before us (1). I cannot perceive a difference between the words "for behoof of" and "in trust for." I hold the expression "for behoof of" to mean exactly the same as if the words used had been "on behalf of" or "for the benefit of," or any of those other words, of which many might be suggested, which indicate that although to the bank you are the absolute owner of the shares, yet as regards a third person, with whom you have entered into an arrangement, you are not that owner; but that makes no difference as regards your position to the bank and to its creditors.

LORD O'HAGAN:—

My Lords, this case appears to me, upon the whole, reasonably clear. I am very glad that the decision to which your Lordships are coming does not necessitate any difference from the Court below with respect to what appears to be the very peculiar condition of Scotch law contrasted with the law of this country—as to which, of course, we should defer very largely to the learned Judges in *Scotland*.

I may observe, with reference especially to the judgment of Lord *Shand*, that it appears to me that we have here to deal simply with the entry in the stock ledger and with the meaning of that entry (2). We have nothing to do with a large inquiry as to the constitution of the company, or with the relative rights of the

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(1) *Ante*, p. 547.

(2) Lord *Shand* said: Even if the transfer and relative entry in the stock-ledger had been in favour of Mr. *Gillespie* and of Mr. *Paterson* without any words of survivorship, or reference to the trust, I have not heard any argument that would satisfy me that this would infer anything short of joint and several liability for the whole stock, or lead to any conclusion except that these gentlemen held the stock as joint owners with the ordinary liabilities of partners for the whole. But it is not necessary to decide that question; for on the face of the register, in conformity with the terms of the transfer, the stock was taken to these gentlemen and the survivor of them in the first place, and for behoof of the firm of *Gillespie & Paterson* in the next. These two elements,—the clause of

members of it. Upon the stock ledger a particular statement is made, and by that statement all parties are bound to stand whether they be shareholders or creditors of the company. That is the statement which instructs them with reference to the rights they may properly assume to exist, and, confining ourselves to that, it appears to me that there is no ground for doubting that if that statement had been read in the ordinary way by persons having access to the stock ledger, the conclusion we are invited by the noble and learned Lord on the woolsack to come to to-day, would be the one at which reasonable people would arrive.

Now, my Lords, looking at the words before us, we have, first of all, a plain right of survivorship, and if it were not a Scotch case, the matter would be tolerably clear. Then we come to the words by which it is said that a trust is established (and these words exist equally in the stock ledger) "for behoof of" the firm. I cannot add anything to what has already been said as to these. They seem to me substantially equivalent to the words "in trust for" the firm. The Lord Advocate was very forcible and ingenious in pointing out that it was consistent with the terms used that the property might be in Mr. *John Gillespie* and Mr. *Thomas Paterson* merely while they were using the name of the firm; and no doubt that was a view of the case which required consideration. But, upon the whole, looking at the matter broadly and according to the effect of common language, I think anyone would reasonably, as my noble and learned friend has said, identify the expression "for behoof of" with the expression "in trust for."

This consideration ought perhaps to be added. It is urged that the establishment of a trust would put an end to the question as

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survivorship and the expression that the stock was held for behoof of the firm of *Gillespie & Paterson*, are plainly sufficient to show that this was a case of joint ownership; and I do not think that in a case where you have that expressly stated on the face of the transfer and in the register, it is competent to contradict that statement either by parol evidence or by the effect of admissions such as we have in this joint minute. The creditors of the company and partners of the company are entitled to take the register as that which embodies their contract, and I do not think you can explain away the effect of the entry in the register by any evidence that that entry is in point of fact incorrect, and that the persons who professed to act as trustees were really not so.

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to the survivorship and the personal rights of the parties, because a trust requires survivorship from its very nature. In the case before us, when we look at the contract, and we see that the members of the old company were to supply capital from time to time for the continuing firm, it becomes evident that the reason of the rule with reference to a trust will apply to this particular case. The exigency of the circumstances would not be satisfied unless we held that in this particular case there was a trust, or something at all events necessarily involving survivorship and not merely a *pro indiviso* interest, as it was described by the Lord Advocate.

We have, I repeat, only to consider the terms of the entry in the stock ledger; and taking those terms together I think that they give a right of survivorship and establish a trust.

LORD SELBORNE:—

My Lords, I am entirely of the same opinion. It appears to me that the judgments of the learned Judges of the Court of Session are altogether satisfactory.

If your Lordships were called upon in this case to enter into the first and principal argument of the learned counsel for the Appellants, I apprehend that it would be necessary for your Lordships to consider the doctrine which was cited from the institutional writers of *Scotland* as to the cases in which contracts and interests in property are, as we should say in *England*, held in common rather than jointly, *pro indiviso* being the Scotch phrase which is equivalent to our phrase "in common;" and we should not only have to consider the doctrine laid down by those institutional writers generally, but we should have to consider it in connection with the particular clauses of this co-partnership deed of the *City of Glasgow Bank;* and it would be necessary to determine in that case whether or no the application of the doctrine, where two persons are registered as proprietors of shares, would be consistent with the deed of the bank.

But your Lordships are not called upon now to enter into that inquiry. What we have to deal with here is a deed which makes the matter clear beyond controversy, and independently of that inquiry, not only by expressly providing for survivorship, which

would be wholly unnecessary in the case of a *pro indiviso* interest, but also by the statement that the shares are held "for the behoof of" the partnership, as to which I entirely agree with what has been said by your Lordships.

I also think that the Lord President was quite right in saying that, as this is a question as to the rights of partners in a bank and creditors of the bank against the persons in whose names the shares are registered, it would not be right to go outside the register and the deed of transfer for the purpose of ascertaining anything which may have passed between the parties, and which as between them might vary the effect of the deed of transfer and the register taken by themselves. That effect is, I apprehend, such that nobody could ever reasonably have regarded it as creating anything but a joint interest. As it happens, the extrinsic evidence confirms that conclusion; but for my own part I agree with the Lord President, that, if it had had an opposite tendency, it ought not to have been regarded.

LORD BLACKBURN:—

I also am of the same opinion.

I do not think it at all necessary or desirable to enter into the question of Scotch law as to what will make obligations, or property, *pro indiviso* when according to English notions they would not be *pro indiviso*. I do not think it necessary to inquire whether if two men were entered on the register as proprietors of the stock in question without anything more, it would be *pro indiviso* or not. I observe that Lord *Shand* gives it as his opinion that it would not (1). I do not pretend to have entered enough into the matter to say how that would be. But this I think appears clear upon the authorities which have been referred to, that although an obligation may *primâ facie* be *pro indiviso*, yet very slight circumstances in the nature of the contract, or an express agreement that it should not be *pro indiviso* but jointly, may prevent its being *pro indiviso*. And as to that, if I understand rightly, the books that were referred to (2), one of the things that have been determined to be sufficient to shew that it is not *pro indiviso*, but

(1) *Ante*, p. 642.

(2) Erskine's Inst. 3, 3, 74; Erskine's Prin. 3, 3, 29; Bell's Prin. ss. 51, 52.

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Lord Blackburn.

is joint and several, is if they have expressly said, "We two mean to enter into this obligation conjunctly." I confess I should have been very much inclined to think, although it is not necessary to decide it, that when they say, "We or the survivor of us enter into it," it would be much the same as if they had said, "We enter into it conjunctly." However, it is not necessary to decide that. There is another thing which is borne out by all the Scotch authorities, namely, if the two take a fund or an estate with a fiduciary obligation to manage it for somebody else, the nature of the case requires that it should be jointly. They cannot take it *pro indiviso*, each having a portion of it, and yet manage the whole as one body for the benefit of those who are beneficially interested. Consequently, when it appears that it is taken in trust for somebody else, or that they stand in a fiduciary relation in respect of it to somebody else, that is quite enough, by itself alone, to shew that they must have taken it conjointly so as to be jointly and severally parties entering into the obligation; in which case all the rest would follow as self-evident.

Now, in the present case, it appeared upon the face of the register, and of the transfer too for that matter, that the shares were taken by *John Gillespie* and *Thomas Paterson* and the survivor of them "for behoof of the firm of *Gillespie & Paterson*." It strikes me that the survivorship alone would make a very strong ground indeed for saying that they took it jointly and severally and not *pro indiviso;* but when it comes to be added that they take it "for behoof of the firm of *Gillespie & Paterson*," I think that at once shews on the face of the matter that as they professed to do something (I need not inquire how much or how little they would actually do) for behoof of the firm of *Gillespie & Paterson;* they undertook it for the purpose of doing something for them which they could not have done if they took it *pro indiviso.* Therefore it appears to me that they sufficiently expressed their intention not to take it *pro indiviso*, but to take it jointly and severally. That is quite enough to shew that the decision of the Court below is right, and ought to be affirmed.

I may add that I agree with the view which I think is expressed more strongly by Lord *Shand* (1), but which is also expressed by the

(1) *Ante*, p. 642.

Lord President, that inasmuch as the Appellants put this upon the register to be seen by the creditors of the bank it does not matter whether they really were holding the stock for the benefit of the firm or not. It is quite enough that they said to the creditors and all persons who would see it, "We are holding this 'for behoof of'" (which I think can have no other sense than partially, at all events, in trust for) "the firm of *Gillespie & Paterson.*" Their saying that was enough to shew that they intended to hold it not *pro indiviso* but jointly and severally, and, having done so, it would not have availed them if they could have shewn that they were not in fact holding it for the benefit of *Gillespie & Paterson.* But when you look at the facts I agree with the Lord President that what is stated upon the register is clearly made out and strictly accurate; that they were holding it in trust for the firm.

LORD GORDON concurred.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Lords' Journal, 1st July, 1879.

Agent for Appellants: *W. A. Loch.*
Agents for Respondents: *Martin & Leslie.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1879 June 20.

CREE, LIQUIDATOR OF THE BONNINGTON SUGAR REFINING COMPANY . . . } APPELLANT;

AND

SOMERVAIL AND OTHERS (THOMSON'S TRUSTEES) . . . . . } RESPONDENTS.

Company—Winding-up—Purchase by Company of its own Shares in the Names of Trustees—Trustees liable—Companies Act, 1862, *ss.* 35, 38, 98.

17 Ch D. 81, 92

One of the articles of association of a Scotch joint-stock limited company enacted that "No transfer of any shares of the company's stock, either upon a sale, or in consequence of the bankruptcy or insolvency of any shareholder, or in consequence of the marriage of any female shareholder, shall be valid or effectual without the consent of a majority of the other shareholders expressed in writing; but in the event of the other shareholders declining to consent to any such proposed transfer of shares in the company, they shall be bound to take such shares at the price offered in the case of a proposed sale, and at the market price of the day in the case of a proposed transfer for any other cause." Added subsequently by special resolution: "Unless such shares shall not at the time be fully paid up, and the reason for declining to consent be that the directors are not satisfied with the proposed transferee."

Trustees entered upon the register were anxious in the discharge of their duty to dispose of their trust shares, which consisted of 100 £100 shares, fifty being fully paid up, and fifty on which £1 per share had been paid. After negotiations, the four directors by special minute approved of the purchase by three of themselves of these shares to be held in trust for the company. A transfer was executed in favour of the three directors "in trust for the company;" and their names were entered upon the register of members, with the same designation. The money paid for the shares came out of the funds of the company; and thereafter the selling trustees ceased to be treated as having any interest therein. At the next general meeting the purchase was approved of by a majority of the shareholders. There was no other transfer or transferees proposed. More than fifteen months after the transaction the company was wound up voluntarily, and calls were necessary to pay creditors. In an application by the liquidator substantially for rectification of the register, by substituting the names of the selling trustees for those of the three directors; it being admitted that all parties had acted with perfect good faith:—

Held, affirming the decision of the Court below, that the names of the three persons—the three directors—now appearing upon the register as

holding these shares could not be disturbed; the transfer to them being valid and effectual, and the rights of creditors having intervened.

Held, also, dissenting from the opinion of the majority of the Court below, that the above article of association did not give any power to the company to become the purchaser of its own shares, nor had the transaction been carried on under its provisions.

Oakes v. *Turquand* (Law Rep. 2 H. L. 325) and *Muir* v. *City of Glasgow Bank* (*ante*, p. 337) followed.

Per EARL CAIRNS, L.C.:—The directors held out to the world that these shares were owned by individuals, and to this the individuals assented. Beyond this creditors had no occasion to look, and they would be entitled to assume that whatever amount of liability attached to the shares was assumed by the individuals in whose name they stood, and that this liability was not in any way diminished by reference to the trust on which they were held.

APPEAL from the Second Division of the Court of Session. The interlocutor appealed against was made on a petition by the Appellant as liquidator in the voluntary winding-up of the *Bonnington Sugar Refining Company, Limited*, praying that the Respondents' names should be put upon the list of contributories. The Lords of Session refused the prayer of the petition with expenses.

The only question raised and brought before the House was whether that prayer should have been granted. The facts material for the decision of that one question were not in dispute. The *Bonnington Sugar Refining Company, Limited*, was formed in 1864 under the provisions of the *Companies Act*, 1862. The memorandum of association was as follows:

1. The name of the company is *The Bonnington Sugar Refining Company, Limited*. 2. The registered office of the company is to be established in *Scotland*. 3. The object for which the company is established is 'the buying and selling of sugar, and carrying on the business of sugar refining, and all processes connected therewith.' 4. The liability of the shareholders is 'limited.' 5. The nominal capital of the company is £50,000, divided into 500 shares of £100 each.

The 12th article of association was as follows:

No transfer of any shares of the company's stock, either upon a sale, or in consequence of the bankruptcy or insolvency of any shareholder, or in consequence of the marriage of any female shareholder, shall be valid or effectual without the consent of a majority of the other shareholders expressed in writing; but in the event of the other shareholders declining to consent to any such proposed transfer of shares in the company, they shall be bound to take such shares at the price offered in the case of a proposed sale, and at the market price of the day in the case of a proposed transfer for any other cause.

By special resolution, confirmed 24th of March, 1873, the following words were added to the said 12th article: 'Unless such shares shall not at the time be

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fully paid up, and the reason for declining to consent be that the directors are not satisfied with the proposed transferee' (1).

The original 500 shares of £100 each were fully paid up. By special resolution passed on the 24th of February, and confirmed 24th of March, 1873, it was agreed to increase the capital of the

(1) Other articles of the co-partnership cited in the arguments of counsel, were as follows:—

"(16.) If the requisitions of any such notice (for payment of calls) are not complied with, any share in respect of which such notice has been given may at any time thereafter, before payment of all calls, interest, and expenses due in respect thereof has been made, be forfeited, by a resolution of the directors to that effect.

"(17.) Any shares so forfeited shall be deemed to be the property of the company, and may be disposed of in such manner as the company, in general meeting, thinks fit.

"(18.) Any member whose shares have been forfeited shall notwithstanding be liable to pay to the company all calls owing upon such shares at the time of the forfeiture.

"(19.) A statutory declaration in writing, that the call in respect of a share was made and notice thereof given, and that default in payment of the call was made, and that the forfeiture of the share was made by a resolution of the directors to that effect, shall be sufficient evidence of the facts therein stated, as against all persons entitled to such share; and such declaration and the receipt of the company for the price of such share shall constitute a good title to such share; and a certificate of proprietorship shall be delivered to a purchaser, and thereupon he shall be deemed the holder of such share, discharged from all calls due prior to such purchase, and he shall not be bound to see to the application of the purchase-money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such forfeiture and sale.

"(20.) The directors may, with the sanction of the company previously given in general meeting, convert any paid up shares into stock.

"(22.) The several holders of stock shall be entitled to participate in the dividends and profits of the company according to the amount of their respective interests in such stock; and such interests shall, in proportion to the amount thereof, confer on the holders thereof respectively the same privileges and advantages for the purpose of voting at meetings of the company, and for other purposes, as would have been conferred by shares of equal amount in the capital of the company.

"(23.) The directors may, with the sanction of a special resolution of the company previously given in general meeting, increase its capital by the issue of new shares.

"(24.) Subject to any direction to the contrary that may be given by the meeting that sanctions the increase of capital, all new shares shall be offered to the members in proportion to the existing shares held by them, ... and if any member entitled declines to accept such shares, the directors may dispose of the same in such manner as they think most beneficial to the company.

"(25.) Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions with reference to the payment of calls, and the forfeiture of shares on non-payment of calls, or otherwise,

company by £50,000, divided into 500 shares of £100 each, to be offered to the then members in proportion to the number of shares held by them respectively. On the new shares thus issued £1 only was paid up; and each of the then members accepted one new share for each original share held by him, and was so entered on the register.

The company appears to have been a *bonâ fide* commercial company. The shares were in very few hands, and seem never to have been dealt with speculatively. And during the whole history of the company, for fourteen years, there were only nineteen transfers of shares upon sale. The original shareholders were closely connected with each other—as relatives or private friends; and the new shareholders who were admitted to the company were similarly connected with the original partners. In 1875 the whole shares, as appears by the register, were held by eighteen shareholders; one was *James Thomson*, who was then a holder of 100 shares, fifty being old fully paid-up shares, and fifty being new shares on which £1 a share had been paid, and £99 a share remained as yet uncalled up. He died in 1875, and it is in respect of the liability to pay the £99 a share on the fifty shares which formed part of his estate that the question is raised in the petition. The other seventeen shareholders continued to be on the register till March, 1878, when the resolution to wind up the company was passed.

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as if it had been part of the original capital.

"(32.) Seven days' notice at the least, specifying the place, the day, and the hour of meeting, and in case of special business, the general nature of such business, shall be given to the members in manner hereafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting; but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting. Any resolution to be submitted by a member to a meeting, beyond the matter contained in the notice given of such meeting, shall be intimated by sending a copy of the resolution to the registered office of the company at least seven days previous to the meeting; and a copy of such intimation shall thereupon be forwarded by the manager, or other official in charge for the time, to each member's address as entered in the books of the company.

"(33.) All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of sanctioning a dividend and the consideration of the accounts, balance sheets, and the ordinary report of the directors."

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The Respondents, *Peter Somervail*, *Thomas Somervail*, *Peter Clouston*, *Matthew Bullwell*, and *John A. Callender*, were the trustees and executors of *James Thomson*, and had got themselves placed on the register of the company as the holders of his old and new shares. Mr. *Thomson* had by his will directed that his trust property should be realized; and his trustees, on the 25th of October, 1876, "after mature deliberation resolved that, if an offer of not less than 40 per cent. on the amount paid upon the shares were received, they should be disposed of," and Mr. *Callender* was authorized to accept such an offer on behalf of the trustees.

Mr. *Callender*, besides being one of the trustees of *Thomson*, was one of the directors of this company. After some negotiation between Mr. *Callender* and Mr. *Rose*, who was also a director, it was arranged that the shares of the testator should be purchased by the directors for the *Bonnington Sugar Refining Company*.

On the 17th of November, 1876, a minute was made, which was as follows:

Part 665

Present: Messrs. *Rose*, *Crabbie*, *Callender*, and *Weir*, Directors. *C. A. Rose*, Secretary. The directors unanimously approved of the purchase by Messrs. *Hugh Rose*, *John Crabbie*, and *John Weir*, from the trustees of the late Mr. *James Thomson*, of *Helensburgh*, of his one hundred shares in this company at the price of 45 per cent. on the original cost; that is to say, the fifty old shares to be bought and paid for at the rate of £45 per share, and the fifty new shares or B. stock in the same proportion on paid-up price. These shares to be held by them in trust for the *Bonnington Sugar Refining Company, Limited.*

It is not disputed that the purchase-money for the shares came out of the funds of the company. In December, 1876, a deed of transfer of the shares was executed by each of the Respondents, and also by *Hugh Rose*, *John Crabbie*, and *John Weir*, which was in the following terms:

"We," *Peter Somervail*, *Thomas Somervail*, *Peter Clouston*, and *Matthew Bullock*, "as trustees of the late *James Thomson*," "in consideration of the sum of £2272 10s. 0*d.* sterling, paid to us as trustees foresaid, by *Hugh Rose*, *John Crabbie*, and *John Weir*, do hereby transfer to the said" *Rose*, *Crabbie*, and *Weir*, in "trust for the *Bonnington Sugar Refining Company, Limited, Leith*, the fifty shares original stock of £100 each, numbered 226 to 275, and also the fifty shares new or B. stock, numbered 926 to 975, all standing in our names as trustees foresaid in the books of the *Bonnington Sugar Refining Company, Limited*, to hold unto the" said *Rose*, *Crabbie* and *Weir*, "in trust as aforesaid, their executors, administrators, and assigns, subject to the several conditions on

which we held the same at the time of the execution hereof; and we, the" said *Rose, Crabbie,* and *Weir,* "do take the said shares in trust as aforesaid, subject to the same conditions."

In the register of shareholders of 1876 an entry was made of the transfer, and *Rose, Weir,* and *Crabbie* were entered as transferees in these words: "*Hugh Rose, John Weir,* and *John Crabbie,* in trust for the *Bonnington Sugar Refining Company, Limited*" (1).

The register for 1877 remained unaltered at the time when the resolution to wind up the company was come to in March, 1878, more than a year after the 11th of December, 1876, when the names of *Rose, Weir,* and *Crabbie* were entered as the persons who were the holders of the 100 shares which had been held by *James Thomson* in his lifetime.

On the 1st of February, 1877, the first general meeting of the shareholders after the purchase of the shares by *Rose, Weir,* and *Crabbie* in trust, was held. The circular convening the meeting was in general terms, and did not specify the exact business to be brought before the meeting. At that meeting nine out of the seventeen shareholders were present, representing 277 out of 450 shares, and they unanimously approved of the transfer. At

(1) The two entries which related to the £100 shares in question appeared as follows on the Register of 1876:—

Name of Shareholder.	Address.	Occupation.	No. of Shares held, Original and New.	Date of Transfer.	To whom Transferred.
The late *James Thomson.*	*Millview, Helensburgh.*	Merchant.	100	Feb. 16, 1876.	*Peter Somervail, Thos. Somervail, Peter Clouston, Matthew Bullock,* and *John A. Callender,* trustees of *Jas. Thomson.*
Peter Somervail, Thos. Somervail, Peter Clouston, Matthew Bullock, and *John A. Callender.*	As trustees for the late *James Thomson,* Esq., *Helensburgh.*	..	100	Dec. 11, 1876.	*Hugh Rose, John Weir,* and *John Crabbie,* in trust for the *Bonnington Sugar Refining Company, Limited.*

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this time the company was prosperous, and it was announced that a gross profit of £13,225 had been made during the preceding year.

On the 4th of February, 1878, the next general meeting was held, at which thirteen out of seventeen shareholders were present, representing 354 out of 450 shares. The minutes of the previous general meeting narrating the approval of the purchase were read and unanimously approved of. The report read at this meeting stated that the year had been one of unexampled calamity in the history of the company.

It was not until the adjourned meeting on the 4th of March, 1878, more than fifteen months after the execution of the transfer, that any objection was made to the purchase by the shareholders. At that meeting a protest was tabled by two shareholders, one of whom was at the time threatening proceedings for a judicial winding-up of the company.

Owing to the company's difficulties from sustaining losses a special resolution was passed on the 12th, and confirmed on the 27th, of March, 1878, to wind up the company voluntarily; and the Appellant, Mr. *James Cree*, was appointed the liquidator.

A call of £30 on each of the new shares was subsequently made, and served on, *inter alios*, the Respondents, who refused to make payment on the ground that for more than a year previous to the winding-up they had ceased to be shareholders. The full extent of the calls not being sufficient to meet the liabilities of the company, the liquidator, being advised that the purchase of shares by *Rose*, *Weir*, and *Crabbie* in trust was *ultra vires* of the directors, presented a petition to the Court of Session for the purpose of having the names of the Respondents as the trustees for *James Thomson* placed on the list of contributories in respect of the fifty new £100 shares upon which £1 had been paid up.

The Respondents lodged answers, and submitted that the prayer of the petition ought not to be granted, in respect that they had long ceased to be members of the company; more particularly (1.) The transaction was a *bonâ fide* purchase and sale for a fair consideration, and was warranted by the provisions of the articles of association; (2.) It was on various occasions ratified and approved by the shareholders, and, *separatim*, was acquiesced in by

them; (3.) The shareholders and the liquidators are barred by *mora* and change of circumstances from repudiating the transaction. A proof was allowed by the Court, and evidence was led which bore out the above facts.

On the 25th of October, 1878, the Court of Session (Lord *Ormidale* dissenting) refused to make any order removing the names of *Rose*, *Weir*, and *Crabbie* from the register, holding that the transfer to them was valid and effectual (1).

On appeal,

May 13, 15. Mr. *Benjamin*, Q.C., and Mr. *Davey*, Q.C., for the Appellant, while admitting that all parties had acted with perfect *bona fides*, and that there was no dispute as to the facts, contended that the articles of association of the *Bonnington Sugar Refining Company* gave no power to the company to purchase its own shares, and without such express power the purchase in trust for the company by three of the directors was *ultra vires*. It was void *ab initio*, and therefore incapable of ratification by the shareholders. The Respondents relied on the 12th article; but the true meaning of that article was that if the shareholders did not consent to the admission of any proposed transferee, then it became the duty of the objecting shareholders to take the stock themselves, and many of the transfers shewed this was the way in which this article had been carried out. It never intended to, nor did it in fact, give authority for the purchase by the company of its own shares. Also no opportunity had been given to the shareholders to purchase themselves, or to object to any proposed transferee.

The three persons *Rose*, *Weir*, and *Crabbie*, now on the register as the holders of *Thomson's* shares, were not, as a matter of fact, before the House, though served with the petition; but they had an indemnity against the company, therefore the question came back to the same thing as a purchase by the company. The only question was, had the Respondents' names been omitted from the register without sufficient cause? Under the combined powers contained in sects. 98, 35 of *Companies Act*, 1862, the register could be restored to its original state before the purchase. [They

(1) Court Sess. Cas. 4th Series, vol. vi. p. 80; Scot. Law Rep. vol. xvi. p. 33.

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cited *Riche* v. *Ashbury Railway Carriage Company* (1); *Ex parte Kintrea* (2); *Zulueta's Claim* (3); *Muir* v. *Glasgow Bank* (4); *Hope* v. *International Financial Society* (5); see also *Oakes* v. *Turquand* (6).]

Mr. *Herschell*, Q.C., and Mr. *H. A. Giffard*, for the Respondents, maintained that this was in effect a proceeding by the liquidator in favour of persons who were now on the register, to relieve them of liability. The company here had, in consistency with its private nature, a right of pre-emption of its own shares, in order to guard against the introduction of partners who might be obnoxious: articles 12 and also 17 of association (7). But apart from any such right the sale here was competently made, and the Respondents were effectually divested by the transfer to the three persons *Rose*, *Weir*, and *Crabbie*, who were *sui juris*, and who had, as between the Respondents and the company, no legal incapacity to hold shares. If the transferees, acting without proper authority, took on a trust which might be a void trust, the transferees must bear the burden of the contract. But there was no illegality in these three persons, who were directors, holding these shares in trust for the company; and a majority of the shareholders had ratified the transaction. The capital of the company, which meant the shares, had not been reduced, for the shares were still in existence. When the transfer was executed, the company had just earned a large profit; and for more than a year the Respondents had ceased to have any interest in the company: see 38th section, *Companies Act*, 1862. *Riche* v. *Ashbury Railway Carriage Company* (1) did not apply. [They also cited and commented on *Ward and Henry's Case* (8); *Ex parte Ward's Case* (9); *Ex parte Sargent's Case* (10); *Elkington's Case* (11); and Nos. 17, 22, 25, of the articles of association of the company (12).]

Mr. *Benjamin*, Q.C., in reply.

(1) Law Rep. 7 H. L. 653.
(2) Law Rep. 5 Ch. Ap. 95.
(3) Ibid. 444; Law Rep. 9 Eq. 270.
(4) *Ante*, p. 337.
(5) 4 Ch. D. 327.
(6) Law Rep. 2 H. L. 325.
(7) *Ante*, pp. 649, 650.
(8) Law Rep. 2 Ch. App. 431
(9) Law Rep. 3 Ex. 180.
(10) Law Rep. 17 Eq. 273.
(11) Law Rep. 2 Ch. App. 511, at p. 522.
(12) *Ante*, p. 650.

The Law Peers having taken time to consider their judgment, delivered the following opinions :—

June 20. EARL CAIRNS, L.C. :—

My Lords, I understand from the judgments of the learned Judges of the Court of Session in this case that Lord *Gifford* and the Lord Justice Clerk (1), who formed the majority of the Court, and who decided in favour of the Respondents, were of opinion that the *Bonnington Sugar Refining Company* had by the operation of the 12th of its articles of association the power of purchasing its own shares. I am unable to adopt that interpretation of the 12th article. It may be open to doubt by what persons or in what manner shares within the meaning of that article are to be bought in the event of the necessary consent to a transfer being refused; but it is perfectly clear to me that in the case before your Lordships that article was not brought into operation; no person intended to act or supposed he was acting under it, and any sweeping determination by the company, or the shareholders, to refuse assent to transfers under that article, for the purpose of becoming themselves owners of the shares, would, in my opinion, have been an exercise not in *bonâ fide* of the power given by that article.

The Appellant is the liquidator of the company, and he applies to the Court to find that the names of the Respondents should be placed on the list of contributories of the company in respect of fifty shares on which £1 a share has been paid up. He makes this application under the combined operation of the 98th and 35th sections of the *Companies Act*, 1862, and the application becomes, as was admitted at the Bar, an application to the Court under the 35th section to rectify the register by removing the names of *Rose*, *Weir*, and *Crabbie*, who now stand upon the register in respect of these shares, and by substituting the names of the Respondents, upon the ground that the former have been entered without sufficient cause, and that the names of the Respondents have been without sufficient cause omitted from the register.

My Lords, there appears to me to be no doubt as to the circum-

(1) Court Sess. Cas. 4th Series, vol. vi. pp. 91, 102.

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stances under which the change of names in the register took place. The shares belonged to the late Mr. *James Thomson*, and the Respondents are his trustees. The company through its directors were willing to buy and the Respondents were willing to sell these shares, and an arrangement was made that *Rose*, *Crabbie*, and *Weir* should purchase the shares and hold them for the company. This is made perfectly clear by the minute of the meeting of the directors of the 17th of November, 1876. [Having read the minute, *ante*, p. 652.]

It is not disputed that the purchase-money for the shares came out of the funds of the company. A transfer of the shares was made by the Respondents. [Having read the transfer, set out *ante*, p. 652.] In the register of shareholders an entry was made of the transfer, and *Rose*, *Weir*, and *Crabbie* were entered as transferees in these words: "*Hugh Rose*, *John Weir*, and *John Crabbie* in trust for the *Bonnington Sugar Refining Company, Limited.*"

All this took place on the 11th of December, 1876, more than fifteen months before the winding-up of the company.

In the argument at your Lordships' bar it was strongly urged that the effect of the transaction was the same as if the company had obliterated these shares from their capital, or had taken a transfer of them into their own name. It was said that the transaction and every part of it was absolutely void; that the Respondents were to be looked upon as they stood on the register before the 11th of December, 1876; and that no attention was to be paid to the transfer into the names of *Rose*, *Weir*, and *Crabbie*.

I cannot take this view of the case. I do not express any opinion as to what rights there may be, or as to whether there are any rights, on the part of the company, or those who represent them, to recall the money paid to Mr. *Thomson's* trustees, nor is it necessary that I should express any opinion as to what the rights of the shareholders of the company *inter se* might be if there were no creditors to be considered. But the rights of creditors have intervened, and those rights the liquidator represents as well as the rights of the company. *Rose*, *Weir*, and *Crabbie* have been on the register as the persons responsible for these shares during a period of upwards of a year. There is no doubt that

they came into that position expecting to be indemnified by the company for anything they might be called upon to pay, and that indemnity they may not be able to enforce; but with that matter it appears to me the creditors have nothing to do. To outside creditors they stand upon the list just as any other persons professing to hold shares upon trust, and creditors are not concerned to inquire into the rights existing between them and those for whom they profess to be trustees. It appears to me to be clear, according to the principles laid down by this House in *Oakes* v. *Turquand* (1), that *Rose*, *Weir*, and *Crabbie* could not as against the creditors come forward and claim to have their own names taken off the register, and so, in my opinion, neither can the Appellant do this in order that he may place upon it the names of the Respondents.

It was contended in the argument at the Bar that the principle on which *Muir's Case* (2) was decided in the *Glasgow Bank* litigation ought to tell in favour of the Appellant. I look upon that decision as opposed to the Appellant's argument. The directors of the company in purchasing these shares felt that it was requisite that the shares should be held out to the world upon the register as owned by individuals, and to this the individuals assented. Beyond this creditors had no occason to look, and they would be entitled to assume, according to the decision in *Muir's Case*, that whatever amount of liability attached to the shares was assumed by the individuals in whose name they stood, and that this liability was not in any way diminished or derogated from by the reference to the trust upon which they were held.

I, therefore, move your Lordships that the appeal be dismissed with costs.

LORD HATHERLEY:—

My Lords, I entirely concur.

The question whether or not this company has power to reduce its own capital, and whether or not it can do so by virtue of the operation of the 12th clause of the articles of agreement, appears to me, as it has appeared to my noble and learned friend, to be wholly beside the question we have now to consider. In the transaction which took

(1) Law Rep. 2 H. L. 325. (2) *Ante*, p. 337.

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place there was no attempt to absorb or merge the capital of the company; on the contrary, the company seems to have thought it right that it should be carefully preserved from such merger—that these shares should be carefully kept distinct and separate from the general body of the capital of the company which might be considered to be (if there be any) unappropriated, by taking care that the shares themselves should be vested in the persons named (and whom it is now sought to remove from the register) as actually owning those shares; as keeping those shares on foot for the benefit of the company, it is true, but as owning those shares distinct from the rest of the shares. As to any question of diminishing the capital, or of merging the capital by what was done, I see no trace of it. Then I see no facts to support the argument that the transaction was such that it must have been known to all parties concerned, I mean to strangers as well as to proprietors in the company, how the transaction had been brought about. Now all they would see upon the register would be this; in place of those gentlemen who had held the shares as the trustees of Mr. *Thomson* (the Respondents), they would see as owners of these shares the names of *Rose, Crabbie*, and *Weir*, and they would see as a fact that they had come in by assignment from the trustees of Mr. *Thomson*. They would see further that they held these shares in trust for the company, but there would be no impossibility of their having come in in a perfectly legitimate way. I am not pronouncing any opinion upon the other view of the case, namely, supposing this had been an attempt to merge the shares, but I say merely there was nothing, as the matter now stood, before the eyes of any stranger, considering whether he should become a shareholder in this company or not, to call for further investigation on his part. He would see that certain shares had been taken by persons who had accepted the position of shareholders in the full sense and were entitled to a share of all profits and liable in respect of all losses sustained by the company, but still as trustees for the company.

The question arising from their being trustees (I do not now say trustees for the company) was disposed of in *Muir* v. *The City of Glasgow Bank* (1). The mere fact of their being trustees would

(1) *Ante*, p. 337.

not be a thing that would require a purchaser to investigate the matter further. As to their being trustees for the company, that might be perfectly legitimate and lawful, whatever view be taken of this case. I am not, as I have said, pronouncing any opinion as to what would have happened if the nature of the transaction had been different, if it had been for the purpose of merging the shares. But those shares might have become vested in a variety of ways in trustees for the company, without their being necessarily the purchasers of them. For instance, Mr. *Thomson* by his own will might, if he had thought fit, or if he had thought such a course was desirable for his own purposes, have made a bequest of these very shares to certain persons as trustees for the company, or he might have made a bequest of them to the company itself, and the company might have found trustees to hold the shares as trustees for them, and to be answerable to third parties in respect of them.

That being so, I apprehend that there is nothing to induce us to say now, after these shares have been registered, as they have been, and after they have been open to all the world as so registered, for more than a year, that the course can be taken of removing these names from the register for the purpose of putting in the names of the original parties who held the shares. I think that would be entirely in the face of the decision in *Oakes* v. *Turquand* (1). The parties are met on the one hand by the decision in *Oakes* v. *Turquand* (1), when they seek to remove from the register the names which creditors may have seen there for fifteen months; and, on the other hand, if they seek to remove those names from the register in consequence of their being entered as trustees on the register, then they are met by the case of *Muir* v. *The City of Glasgow Bank* (2). Therefore they are met either way, and unless there is some third ground of acting, which has not yet come in controversy with reference to matters of this description, the application must fail. I do not say whether there might be any other ground on which a controversy might be raised, but unless they could make out that these shares had been actually merged, if the question had arisen before us as to whether there was a power of merging capital, or some question such as that, which was

(1) Law Rep. 2 H. L. 325. (2) *Ante*, p. 337.

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attempted to be argued, but not very successfully, except upon some new ground such as that, I do not see why that which is sought by the liquidator should be conceded to him.

I think the proper course was taken by the learned Judges in the Court of Session, namely, to refuse to make any order removing these names from the register, and I think that your Lordships' House should sanction that course; and the consequence follows that this appeal should be dismissed.

LORD O'HAGAN:—

My Lords, concurring as I do in the conclusion at which my noble and learned friend on the woolsack has arrived, and in the reasons which he has very succinctly given to your Lordships, I do not think it necessary to repeat those reasons or to restate the short facts on which they have been founded. I shall merely say a few words in sustainment of the view expressed by my noble and learned friend.

The real purpose of the Appellant is to obtain a rectification of the register by substituting the names of the Respondents, as former holders of the shares, for those of the persons in whom they are at present vested. I do not think that we are warranted in permitting this, upon any of the grounds presented at the bar. No doubt, the whole transaction was *bonâ fide*. No doubt, Messrs. *Rose*, *Crabbie*, and *Weir* openly and honestly purchased the shares in trust for the *Bonnington Company;* and, no doubt, the money which paid for them was supplied from the funds of that company. On these points, the transfer from the trustees and the resolution of approval of the 17th of November, 1876, furnish conclusive evidence, and there is no real controversy as to the facts. Neither has there been any as to the legal incapacity of the company to become the purchaser of its own shares, unless the purchase was authorized by the memorandum and articles of association. And, on the construction of the 12th of those articles, I am not prepared to say that my opinion concurs with that of the majority of the Scottish Judges, which notwithstanding, in the result and for other reasons, I approve. If I were driven to sustain their judgment merely on that section, I should more than hesitate. There is much obscurity in the wording of it; but it seems to me to have

been framed *diverso intuitu*: to regard a state of things such as we have not to deal with, and never to have been contemplated as warranting the impeached act of purchase, at the time when that act was done. It points to a transaction by individual shareholders and not by the company, and the chairman, Mr. *Rose*, states expressly that the right of pre-emption set forth in the 12th article "was never exercised." So far, I am disposed to go with the very able judgment of Lord *Ormidale*.

But, however irregular may have been the proceeding by which the present registered shareholders acquired possession of the shares, whatever may be ultimately the legal ascertainment of their relations with the company for which they bought in trust, and from which they were reasonably justified in expecting indemnity, and whether or no the shareholders could be successful in seeking a return of the money advanced to the trustees—I do not see that we can now obliterate from the register the names of the purchasers and put others in their place. I agree with the Lord Chancellor that such a rectification could not be effected at the instance of the registered transferees, and no sufficient reason has been given for making it at the instance of the liquidator.

Messrs. *Rose, Crabbie*, and *Weir*, thought proper, at the desire of the company, to buy the shares. They paid the price: they took the transfer: they allowed themselves to be registered and incurred all the responsibilities, and acquired all the rights, attendant on registration: they held themselves out to the world as the owners of the shares and pledged their credit to those who had dealings with the company. And, having regard to the principles on which this House has acted, very recently, in a series of most painful cases (1), I cannot see that they could be exonerated in a proceeding against them by creditors whilst their names remain on the register, or that they would be able to procure exoneration by any attempt to alter the entries there. If such an alteration could not be made, affecting their position and the relations and liabilities of those connected with them, by any effort of their own, it seems to me impossible to hold that the liquidator can prevail, when he asks to substitute one set of names

(1) *Ante*, p. 547.

H. L. (Sc.) 1879 CREE v. SOMERVAIL. Lord O'Hagan.

for another and diminishes, it may be in a most serious way, the value of the security on which creditors may have relied.

The disclosure of the fiduciary character of the registered transferees could not, this House has held, diminish their personal liability. It might afford, as Lord *Gifford* observes in the case before us, "a very good proof of trust as in a question between them and the beneficiaries for whom they are trustees." But the statement was dictated by themselves and not by the persons assigning to them; and it did not concern those to whom their voluntary acceptance of the position of registered shareholders made them responsible. Whatever may have been the original taint of the transaction or the effect of the subsequent ratification by which it is said to have been validated, and whether as between the company and their trustees it was valid or not, I do not think that we can now alter the condition of the register with such consequences as I have indicated; and I therefore support the proposal made by my noble and learned friend.

LORD BLACKBURN, having stated the facts as above, at p. 649:—

I agree with the opinion expressed by the noble and learned Lords who have already spoken that, whatever be the true construction of the 12th article the parties in this case were not acting under it.

By sect. 23 of the *Companies Act*, 1862, every person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company; and by sect. 37 the register of members shall be *primâ facie* evidence of any matters by this Act directed or authorized to be inserted therein; but independently of sect. 37 what was entered on the register was true; the transferees had agreed to become members of the company.

If this had been an English or Irish company no notice of any trust could have been entered on the register. But as this was a Scotch company it was lawful to enter a notice of trust on the register, and accordingly it is entered that the transferees held the shares "in trust for the *Bonnington Sugar Refining Company, Limited*," and so much the creditors ought to have known. On

this much the Appellant's argument was founded. I will notice it presently.

In the meantime I will proceed to state those matters which are not stated on the register, and which, being unknown to those who during those fifteen months trusted the company, cannot diminish the rights of the creditors. If the creditors (or the liquidator acting for them) had made a case that the transferees were men of straw, whilst the original transferors were solvent; or any other case shewing that the keeping of the register as it is was prejudicial to the creditors, and on that ground had sought to have the register rectified, different considerations would arise; but no such case is set up. The transferees are, as far as appears, quite as capable of paying the calls as the transferors, and in truth this seems really to be an application in the interest of Messrs. *Rose*, *Weir*, and *Crabbie*, who, if they have any ground for removing their names, should make the application themselves, and not in the name of the liquidator.

The testator *Thomson* had by his will directed that his trust property should be realised; and his trustees on the 25th of October, 1876, "after mature deliberation resolved that, if an offer of not less than 40 per cent. on the amount paid upon the shares were received, they should be disposed of," and Mr. *Callender* was authorized to accept such an offer on behalf of the trustees.

Mr. *Callender*, besides being one of the trustees of *Thomson*, was one of the directors of this company. After some negotiation between Mr. *Callender* and Mr. *Rose*, who was also a director, it was arranged that the shares of the testator should be purchased by the directors for the *Bonnington Sugar Refining Company*. There was no disguise about the matter; a minute was made which has been already read (1).

The transfer was then prepared, and the price was paid out of the funds of the company, and Mr. *Callender* at least knew that price was paid out of the funds of the company, which I think ought not to have been done, though it is probably not necessary for your Lordships to decide this.

It has been argued that this transaction was illegal as being an attempt to reduce the amount of the share capital, and in effect

(1) See *ante*, p. 652.

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extinguish the 100 shares. It certainly was not intended to have any such effect; and though, if the shares had been conveyed direct to the company and the company been entered on the register as holders of these shares, it might have been argued that (whatever was intended) the legal effect was to extinguish the shares, no such consequence follows from conveying the shares to three men *sui juris*, fully competent to agree to be members of the company, and able to fulfil all the conditions attending on being members; and entering their names, with their assent as the persons holding the shares, though at the same time declaring on the register that the shares were to be held by them in trust for the company.

But the case of *Ashbury* v. *Riche* in this House (1) determines that the true construction of the *Companies Act*, 1862, is that companies incorporated under it are authorized to trade in the manner authorized by the memorandum of association *and in no other;* and that it is not only beyond the authority of the managing body to enter into any contract beyond its scope, but also *ultra vires* of the company itself. And this certainly goes a great way to establish that the application of the funds of the company to the purchase of those shares was an application of their funds to an illegitimate purpose, and that it could have been prohibited whilst still executory, even if every existing shareholder had assented to it. If the case made here by the Appellant had been one of repetition claiming to get back this money from the Respondents they would have had to refund it or to defend themselves from that claim as they best might; but no such case is made.

It appears here that a large majority of the shareholders knew of this purchase, and approved of it. Even if they had unanimously approved of it, that would not have affected the question whether the company was bound by this improper application of its funds. But if those approving shareholders, or if the four directors, who certainly were parties to the application of the funds, had, on being told that the application of the company's funds to such a purpose was wrong, subscribed and replaced the sum so misapplied, it would have completely rectified the mischief arising from the collateral illegality: it would seem that the

(1) Law Rep. 7 H. L. 653.

Appellant's argument requires them to maintain that even in that case the transfer would still be entirely illegal, and after any lapse of time might be set aside. This, I think, is a question quite collateral to that meant by the petition, and that it is unnecessary to express any opinion on it.

The same case of *Ashbury* v. *Riche* (1) goes a great way to say that when the directors requested Messrs. *Rose, Crabbie,* and *Weir* to hold these shares as trustees for the company, and thereby, impliedly though not expressly, engaged to indemnify them against the consequences of their so doing, they made an engagement which, so far as it professed to bind the company, was not merely beyond their authority as mandatories for the company but also an engagement beyond the competency of the company itself, and consequently that these gentlemen, if called on to pay calls, can only have recourse against those individuals, if any, who requested them to incur this liability. This is a question to be raised by Messrs. *Rose, Crabbe,* and *Weir,* who being not parties to this litigation, at least in form, may perhaps in some other process shew that the facts here were misapprehended. But as it seems to me this question also is quite collateral to that raised by the petition in this case. The prayer of the petition is, that the Respondents should be placed on the list of contributories, a prayer which necessarily involves that the register of shareholders should be rectified by taking off the names of Messrs. *Rose, Crabbie,* and *Weir.* The argument is, that this should be done because to hold shares in trust for such a company is in itself a legal impossibility or rather illegality. The argument must, I think, be pushed to this extent, that even if the transferees had at the time of the transfer believed that they could have no legal claim for indemnity against the company, and had in express terms said that they would make no such claim, relying for indemnity entirely on the moral obligation of those who, being shareholders, approved of their conduct, the trust would be illegal.

This is a position which seems rather startling. No authority exists for it, and if the point arises here, which I doubt, I think your Lordships should hold that it is not correct.

I therefore entirely agree in the motion proposed.

(1) Law Rep. 7 H. L. 653.

H. L. (Sc.) 1879 CREE v. SOMERVAIL.

LORD GORDON:—

My Lords, I concur in the opinion which has been expressed by your Lordship on the woolsack.

I think the transaction in question does not fall under the 12th section of the articles of association; and I am also of opinion that that section does not confer on the company the power of purchasing its own shares.

But while I am of that opinion, I also think that the Appellant is not entitled to have the names of the Respondents placed on the list of contributories of the company. The names of the Respondents were removed from the register of shareholders more than fifteen months before the commencement of the winding-up of the company; and on the removal of the names of the Respondents the names of Messrs. *Rose, Weir,* and *Crabbie* were substituted in their place. I think it is not necessary for the disposal of this case to express any opinion as to the liabilities of these gentlemen, who are not represented in the present proceedings. But, as their names were put on the register, and were on the register at the time of the winding-up of the company, I think that *primâ facie* they must be held to be rightly on the register, and while their names remain on the register I think the Appellant has neither right nor title to apply to have the names of the Respondents restored to it.

I think the circumstance that the names of Messrs. *Rose, Weir,* and *Crabbie* appeared on the register as holding the shares "in trust" for the company does not affect the question involved in the present application. Those words may or may not affect the personal liability of these gentlemen, but that is a point which your Lordships are not now called on to decide.

I am therefore of opinion that the result arrived at by the Court of Session was right, and that the appeal should be dismissed.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 20th June, 1879.

Agent for Appellant: *William Robertson.*
Agents for Respondents: *Phelps, Sidgwick, & Biddle.*

[PRIVY COUNCIL.]

THE OWNERS OF THE VESSEL BYFOGED CHRISTENSEN . . . . . } APPELLANTS;

AND

THE OWNERS OF THE VESSEL WILLIAM FREDERICK . . . . . } RESPONDENTS.

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CONSOLIDATED CAUSES.

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF GIBRALTAR.

Collision—18th Rule—Contributory Negligence.

It is dangerous to the public to leave to masters of vessels a discretion as to obeying or departing from the sailing rules; and accordingly such a discretion need not be exercised except in cases of very clear necessity.

Where a collision has occurred owing to one colliding vessel having failed to observe (as its duty was) the rule of the road, by keeping out of the way, *held*, that in the absence of proof as to the particular time at which an intention to violate that rule was clearly manifest, the other colliding vessel, being *primâ facie* bound to observe the 18th rule by keeping on its course, would not have been justified in departing therefrom.

The Commerce (1) commented upon.

APPEAL from a decree of the Vice-Admiralty Court of *Gibraltar* (Dec. 4, 1878).

The Appellants sued the Respondents in the Court below for the recovery of damages in respect of a collision which took place between the *Byfoged Christensen* and the *William Frederick*. The Respondents about the same time instituted a cross cause against the Appellants in respect of the same collision, and the two actions were by consent heard at the same time upon the same pleadings and evidence, and but one judgment was pronounced and one decree made in the consolidated causes.

The facts are stated in the judgment of their Lordships.

* *Present*:—SIR JAMES W. COLVILE, SIR ROBERT PHILLIMORE, SIR BARNES PEACOCK, and SIR ROBERT P. COLLIER.

(1) 3 W. Rob. 287.

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Mr. *C. P. Butt*, Q.C., and Mr. *Stubbs* (Dr. *W. G. F. Phillimore*, with them), for the Appellants.

Mr. *Milward*, Q.C., and Mr. *Clarkson*, for the Respondents.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

The collision out of which these appeals have arisen took place a few miles from Cape *Spartel* on the 26th of August, 1878, about five o'clock in the afternoon. The colliding vessels were the *Byfoged Christensen*, a Norwegian barque, and the *William Frederick*, an American three-masted schooner. The former vessel was bound on a voyage from *Majorca* to *New York*, and was therefore coming out of the *Mediterranean*. The other vessel was bound on a voyage from *New York* to *Venice*, and was therefore entering the *Mediterranean*. They were sailing and crossing vessels, and the sailing rules applicable to the case are the 12th and the 18th.

Both parties are agreed that the American vessel was on the port tack and had the wind on the port side, whatever was the precise direction from which the wind was coming. Hence the Appellants have correctly contended that it was only in case the *Christensen*, which had the wind on her starboard side, was free that it would be her duty to keep out of her way; and that, if she were not free, it would be the duty of the American ship to keep out of her way.

The case is peculiar, because each vessel seems, up to the moment of collision, or at least up to the time when the collision became inevitable, to have kept its course, and to have acted as if it were the duty of the other vessel to keep out of its way. The question which of the vessels was right in throwing that obligation on the other depends upon the question what was the real direction of the wind. The *Christensen* contends that the wind varied from north and by west to north; the other vessel says that it was from north-north-east to north, and by east. The difference between them is not less than one, or more than three points of the compass. Their Lordships have no difficulty in coming to the conclusion that if the direction of the wind was north and by east,

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or north-north-east, or anywhere between those two points, the *Christensen* would have been free within the meaning of the 12th rule. The learned Judge of the Court below has, upon very conflicting evidence,—each crew swearing pretty consistently to the direction for which each contended,—found that the wind was to the east of north, and their Lordships would not, without having strong grounds for coming to a contrary conclusion, be disposed to interfere with that finding of fact. An argument on the part of the Appellants was founded on the following passage in the judgment under appeal. The learned Judge there says: "I feel therefore compelled, but after much hesitation, to decide that the *Byfoged Christensen* had the wind, if not altogether free, at all events some points more in her favour than the *William Frederick*, and that according to the 12th rule of the road she ought to have given way to the *William Frederick*." Upon this passage it was argued by Mr. *Stubbs* that it is consistent with the hypothesis that both vessels were close-hauled vessels, in which case it would be the duty of the vessel which had the wind on the port side to give way. There may be some ambiguity in the first part of the sentence; but taking the whole sentence together, their Lordships cannot but think that it amounts to a finding that the *Christensen* was a free vessel within the meaning of the 12th rule of the road; and even if there had been greater ambiguity in the expression of the learned Judge's judgment than their Lordships think there is, they would still think that if the direction of the wind was properly found to be what he found it to be, the *Christensen* would have been a free vessel, and in that opinion they are confirmed by their nautical assessors.

The next question is whether the finding as to the direction of the wind was justified by the evidence. It seems to their Lordships that it was so. The most plausible point made against that finding was the argument of Mr. *Butt* as to the position of the vessels at the time of the collision. He contended, that had the wind not been as it was stated by those on board the *Christensen*, to be, that is, varying from north to north and by west, the vessel would not, according to the ordinary course of navigation, have been so near *Cape Spartel* as she was when the collision took place. But on consultation with the sailing-masters, their Lord-

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ships find that she was upon the course which a vessel bound to *New York*, and getting out of the *Mediterranean*, would naturally have taken, and that her position at the time of the collision was by no means inconsistent with the fact that the wind was in the quarter in which the American vessel and its crew say that it was.

That being so, their Lordships have no difficulty in affirming the decision that it was the duty of the *Christensen*, according to the rule of the road, to keep out of the way of the other vessel, and that she failed to do so.

The question raised by the cross-appeal arises upon the finding of the learned Judge that both vessels were to blame, on the ground that although the duty of keeping out of the way lay upon the *Christensen*, those on board the *William Frederick*, when they found that the other vessel was not going to perform its duty, ought not to have pertinaciously adhered to the 18th rule of the road by keeping on their course, but should have adopted some manœuvre in order to avoid the collision which afterwards took place. The learned Judge in so deciding, relied on the case of *The Commerce* (1), before Dr. *Lushington*. Their Lordships desire to remark that though the principle involved in that case may be in itself a sound one, it is one which should be applied very cautiously, and only where the circumstances are clearly exceptional. They conceive that to leave to masters of vessels a discretion as to obeying or departing from the sailing rules is dangerous to the public; and that to require them to exercise such discretion, except in a very clear case of necessity, is hard upon the masters themselves, inasmuch as the slightest departure from these rules is almost invariably relied upon as constituting a case of at least contributory negligence. In the present case, their Lordships think that the principle of the decision in the case of the *Commerce* is not applicable. There is no *constat* at what particular time the master of the *William Frederick* ought to have come to so distinct a conclusion that the other vessel was not about to obey the rule as to justify his departure from what was his *primâ facie* duty. Their Lordships cannot infer from the facts proved in the case that he was bound to come

(1) 3 W. Rob. 287.

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to such a conclusion before the moment at which it appears he luffed up in the wind; and after consulting with the sailing-masters, they have come to the conclusion that that was the best thing which, under the circumstances, he could have done; that if he had tried by any other manœuvre actively to get out of the way of the other vessel, there would still have been a collision, and that the consequences of that collision might have been aggravated owing to the greater way which his vessel would have had upon it. Their Lordships therefore think that no case of contributory negligence has been made out against the *William Frederick*, and they must humbly advise Her Majesty to allow the cross-appeal, to reverse the decision of the Court below, to pronounce that the *Byfoged Christensen* was alone to blame for the collision, to dismiss the suit of the owners of that vessel, and to condemn them to bear and pay the whole amount of the damages sustained by the *William Frederick*, and further to pay the costs of both suits in the Court below, and also the costs of these appeals.

Solicitors for Appellants: *Stokes, Saunders, & Stokes.*
Solicitors for Respondents: *Thomas Cooper & Co.*

[PRIVY COUNCIL.]

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JOHN KINDLAN COLLINS . . . . . DEFENDANT;

AND

JAMES LOCKE . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF VICTORIA.

Agreements in Restraint of Trade—Reasonableness of the Restraint—Arbitration Clause—Award not a Condition Precedent to Right of Action.

14 Ch D 359 361

Agreements in restraint of trade are against public policy and void, unless the restraint they impose is partial only, and reasonable in relation to the objects of the contract; and also unless they are made upon a real and *bonâ fide* consideration.

Where the object of an agreement is to parcel out the stevedoring business of a particular port amongst the parties to it, and so to prevent competition, at least amongst themselves, and also, it may be, to keep up the price to be paid for the work:—

Held, that such agreement is not invalid if carried into effect by provisions reasonably necessary for the purpose, though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade.

A provision that if a particular merchant named in the agreement should refuse to allow the stevedoring of any ship to be done by the party entitled to it under the agreement, and should require one of the other parties to do it, such party so required should give an equivalent to the party who lost the stevedoring, is not unreasonable either as regards the party entitled or as regards the merchant.

But a provision that in the case of ships passing out of the hands of merchants named in the contract into the hands of other merchants, who should not choose to employ the party entitled under the agreement, all the parties thereto are deprived of the work, cannot be justified. It is obviously detrimental to the public, is entirely beyond anything the legitimate interests of the parties required, and is utterly unprofitable and unnecessary, at least for any purpose which can be avowed.

A clause which stipulates that all matters in difference which should arise touching the agreement should be submitted to arbitration, and prohibits any action being brought in respect of the matters actually submitted to arbitration, is a collateral and independent agreement, and an award thereunder is not a condition precedent to such action, except as regards such sums as under the agreement are not payable until the amount thereof has been ascertained by such award.

APPEAL from two judgments of the Supreme Court (April 4, 1877), one discharging a rule *nisi* which had been obtained for a

* *Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

new trial, and the other allowing a demurrer to two of the Defendant's pleas.

On the 7th of October, 1870, the Appellant and Respondent, and other persons then carrying on the business of stevedores in the port of *Melbourne*, entered into an agreement under seal for the purpose of preventing competition. The effect of the agreement (the main provisions of which are set out in their Lordships' judgment) was as follows: — The parties agreed that as between the parties thereto the Appellants should be absolutely entitled to the business of stevedoring all ships that should arrive at *Melbourne* consigned to the firm of *J. H. White & Co.*, the Respondent should be entitled to the business of stevedoring all ships that should arrive at *Melbourne* consigned to either of the three firms, Messrs. *Holmes, White, & Co.*, Messrs. *R. Towns & Co.*, and Messrs. *King, Meng, & Co.*, and the other parties should be entitled to the business of stevedoring ships consigned to certain other firms therein mentioned; and that they would not undertake or be in any way concerned in or interfere in, in whole or in part, the stevedoring of any ship consigned to any of the firms therein mentioned except in accordance with the agreement.

That if either of the firms refused to allow the stevedoring of any ship consigned to them to be done by the party entitled to it under the agreement, but should require any other of the parties to do it, the party doing it would give an equivalent to the persons so losing the stevedoring of an amount to be determined by arbitration.

That the stevedoring of all ships not consigned to any of such firms should be undertaken by the parties (other than the Respondents) in turn in the order of their arrival.

That if any of the named firms should cease to do business, or the proportion of ships consigned to them should be materially altered, a re-adjustment should be made between the parties to the agreement, and in case of any firm having ceased to do business, the parties losing such firm should be entitled to select another carrying on business of equal importance.

That in case of disagreement the matter should be referred to arbitration.

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That the parties would not directly or indirectly aid in the establishment of other firms of stevedores. That all disputes should be referred to arbitration, and that the parties should not be entitled to commence or maintain any action at law or suit in equity in respect of the matters so submitted as aforesaid, except for the amount or amounts by the said award determined to be paid by any one or more of the said parties to the other or others of them.

The facts are stated in the judgment of their Lordships.

The Respondent filed his declaration dated the 10th of February, 1877, and containing counts in effect as follows:—

1. The stevedoring by the Appellant of certain ships which arrived consigned to *Holmes, White, & Co.*, that firm not refusing to allow the Respondent to work for them.

2. The refusal of the Appellant to pay an equivalent to the Respondent for the stevedoring of certain ships which arrived consigned as aforesaid, and which the said firm employed the Appellant and refused to allow the Respondent to stevedore.

3. The stevedoring by the Appellant of ships which arrived consigned to Messrs. *Stewart & Couch*, a firm which the Respondent had selected instead of Messrs. *R. Towns & Co*, on the latter ceasing to carry on business, although Messrs. *Stewart & Couch* did not refuse to allow the Respondent to stevedore.

The particulars of breaches gave the names of three ships, *Jason, Clara*, and *Eastern Monarch*, as those to the work of which the Respondent claimed to be entitled under the said agreement.

The Appellant on the 15th of February, 1877, pleaded five pleas:—

1. That the deed was not his deed.

2. A denial of the alleged breaches.

3. That the Respondent had not referred the difference to arbitration in accordance with the terms of the agreement.

4. That there was no consideration to the Appellant for the execution of the indenture of agreement save as appears therein.

5. As to the third count or breach, that the Respondent had not pursuant to the terms of the agreement selected Messrs. *Stewart & Couch* to replace Messrs. *R. Towns & Co.*

6. As to the same, that the other parties to the agreement had not agreed to such selection.

The Respondent took issue on the first, second, fifth, and sixth pleas, and demurred to the third and fourth.

The jury found a verdict for the Respondent for £280 in respect of the *Clara* and *Eastern Monarch*, and contingently for £75 in respect of the *Jason*. Leave was reserved to either party to move to enter the verdict, and to the Defendant to reduce the damages.

On the 23rd of March, 1877, the Appellant obtained a rule *nisi* to enter the verdict for the Defendant, or reducing the damages to £20.

On the 4th of April, 1877, the rule *nisi* was discharged with costs; and final judgment was entered up as follows:—Verdict for the Plaintiff, on the first and third counts, damages £280, costs, £140. 5*s*. 10*d*., and verdict for Defendant on the second count: Plaintiff's demurrers allowed.

The following reasons were stated by the Supreme Court:—

Stawell, C.J.:—"The question under this rule *nisi* is, as to the sound construction of the first covenant, considering the second only as far as it applies to the first. What is the meaning of 'arrive consigned?' does it continue to apply to the ship after she has left the hands of the firm to which she was consigned on that voyage, and while she remains in the port of *Melbourne?* It turns on the way in which the word 'consigned' is treated in the after part of the first covenant, not on the meaning of the word 'arrive'; I think that it is not limited to the time during which the ship remains in the hands of the firm to whom she was consigned. If a stevedore other than the one to whom this contract allotted her is employed, then the former is to give an equivalent to the latter. The rule must be discharged."

Fellows, J.:—"The meaning of the contract is that certain shipping firms in this port are to be divided into four sets, one set being allotted to each party to the agreement, and that every ship consigned to one of these firms is to be worked by the party to whom the set comprising that firm was allotted, if he can get her. It is possible that firm may not wish to give the ship to the steve-

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dore to whom she has been allotted, or the person to whom the ship may afterwards be chartered, may be unwilling to do so. In one of these events, one of the other parties may do the work, in the other case the others may not; and the ship is, so to speak, tabooed to them all. The jury took the latter view, and, though it was not a question for them, they have decided rightly, and the damages assessed must stand.—Rule discharged."

Upon the demurrers the Court delivered judgment as follows:—

Stawell, C.J.:—"The second breach is for not paying an equivalent for the stevedoring of a ship, which, by the request of the consignee, was stevedored by the Defendant. The contract is, in effect, to pay an 'equivalent to be determined by arbitration.' Until, therefore, the equivalent has been so determined, no action can be brought for it, and the second breach is consequently bad. This indeed was almost conceded in the argument.

"The other breaches are framed on a contract that the Defendant will not stevedore any ship which by the agreement is allotted to the Plaintiff. That covenant has been broken, and as there is no stipulation in it making it necessary to have the damages occasioned by the breach of it ascertained before suing, the Plaintiff is entitled to sue for them in the ordinary way.

"There is, however, a distinct covenant that all disputes shall be referred to arbitration. That covenant is quite independent of the other, and may be broken by the Plaintiff without depriving him of the right to sue for the Defendant's breach of the absolute covenant not to stevedore. The agreement to refer is in no sense a part or 'condition' of the covenant not to stevedore. It was therefore quite unnecessary to arbitrate before suing, and the breaches assigned on it are consequently free from objection on that score.

"It was, however, urged by the Defendant that the whole contract was void as being in restraint of trade, and *Hilton* v. *Eckersley* (1) was relied upon in support of that objection. It is not, in our opinion, an authority which applies to the present case. There is not in this contract any stipulation at all like the terms of the bond in *Hilton* v. *Eckersley* (1). In that case all the parties

(1) 6 E. & B. 47; 24 L. J. (Q.B.) 353; 25 L. J. (Q.B.) 199.

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agreed to be bound by any resolution that might be passed as to the mode of conducting their trade, even to the extent of suspending all their trading operations.

"In the present case nothing more is contemplated than an apportionment of work in the port of *Melbourne* between the contracting parties. Certain ships are allotted to each of them, and they merely stipulate that they will not compete with or encroach upon each other, but will confine themselves each to his own allotted ship. This it was contended was analogous to a contract between traders by which a district was allotted to each within which to vend his wares and into which the other should not intrude. We concur in that view."

Mr. *Bompas*, Q.C., and Mr. *J. D. Mayne*, for the Appellant:—

Upon the evidence there was no proof that the Plaintiff had selected *Stewart & Couch* in place of *R. Towns & Co.* in terms of the agreement and as alleged in the declaration; it was proved that *Stewart & Couch* had refused to allow the stevedoring of the *Clara* and *Eastern Monarch* to be done by the Respondent, and had required the Appellant to do the same within the meaning of the agreement; it was not proved that the Respondent had sustained any damage by the acts of the Appellant. If the verdict were not entered for the Appellant, it ought at least to have been reduced to £20.

The main points of law are, first, the agreement was void as being opposed to public policy, and entered into without any sufficient consideration to the Defendant. It is in restraint of trade, and the public receive no equivalent advantage. An agreement amongst tradesmen that some of them shall supply certain persons and others shall not supply them is bad. Reference was made to the *Bridgwater Case* (1); *Hilton* v. *Eckersley* (2); *Wallis* v. *Day* (3); *Mallan* v. *May* (4); *Leather Cloth Company* v. *Lorsont* (5). This case is distinguishable from those cases in which two or more traders agree to divide the country into certain districts, and each to confine himself to his own allotted portion, and thereby lessen

(1) 4 H. L. C. 1.
(2) 6 E. & B. 47; 24 L. J. (Q.B.) 353; 25 L. J. (Q.B.) 199.
(3) 2 M. & W. 273, 280.
(4) 11 M. & W. 653.
(5) Law Rep. 9 Eq. 345, 353.

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the expenses of their trade and so be able to sell at a less price. In such cases the agreement is for the benefit of the public: *Wickens* v. *Evans* (1). A general restraint of trade is bad, but a partial restraint is good if there be a countervailing advantage, or, at all events, no disadvantage to the public and consideration is given for it. [SIR MONTAGUE E. SMITH:—The object of this agreement does not appear to have been illegal, but in carrying it out it is possible that there may have been some arrangement in illegal restraint of trade.]

Second, it was a condition precedent to bringing any action under the agreement that the matter in dispute should have been previously submitted to arbitration: see the negative words in the 11th clause. Reference was made to *Dawson* v. *Fitzgerald* (2); *Halfhide* v. *Fenning* (3): *Dimsdale* v. *Robertson* (4); *Scott* v. *Avery* (5); *Tredwen* v. *Holman* (6); *Hemans* v. *Picciotto* (7); *Heaton* v. *Sayer* (8).

Mr. *Westlake*, Q.C. (Mr. *Benjamin*, Q.C., with him), for the Respondent, after contending that upon the evidence the verdict and judgment were correct:—The agreement was good in law and was made upon or imported a sufficient consideration. The effect of it was to distribute business without diminishing its volume, and therefore it was valid. There was no unreasonable restraint of trade, calculated to prejudice the public, or affording any unfair protection to the interests of the Respondent. See *Ward* v. *Byrne* (9); *Leighton* v. *Wales* (10); *Gale* v. *Reed* (11).

With regard to the arbitration clause it is a question of construction as to the precise moment when the breach is completed and the right of action ensues. Here the arbitration clause was distinct from the preceding clauses, and did not limit the right of action under them. If a man contracts to do or omit, otherwise to pay damages as awarded, there can be no breach before award: see *Scott* v. *Avery* (12). But in this case the agreement to refer

(1) 3 Y. & J. 318.
(2) Law Rep. 9 Ex. 7; 1 Ex. D. 260.
(3) 2 Bro. C. C. 336.
(4) 2 J. & L. 58.
(5) 5 H. L. C. 811.
(6) 1 H. & C. 72; 31 L. J. (Ex.) 398.
(7) 1 C. B. (N.S.) 646.
(8) 4 H. & N. 643.
(9) 5 M. & W. 561.
(10) 3 M. & W. 545.
(11) 8 East, 80.
(12) 5 H. L. C. 847.

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was collateral and independent, and unless matters in difference have been actually submitted to arbitration, it was not intended that an award should be a condition precedent to the right to sue: see *Horton* v. *Syer* (1); *Edwards* v. *Aberayron Mutual Ship Insurance Society* (2); where it was held that the negative words employed in that case did not create a condition precedent, and *Brett*, L.J., declared that *Tredwen* v. *Holman* (3), relied upon on the other side, is not law.

Mr. *Bompas*, Q.C., replied.

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The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

The action in which this appeal has been brought arises out of a contract entered into between certain persons carrying on the business of stevedores in the port of *Melbourne* for regulating and distributing among them the stevedoring of ships in that port.

By the deed, which contains the agreement, the four parties to it, viz., the firm of *George Washington Robbins* and *Francis Robbins Collins* (the Defendant in the action and the present Appellant), *Alfred John Johnson*, and *Locke* (the Plaintiff, and the Respondent in this appeal), covenanted with each other, first, that "as between the parties" Messrs. *Robbins* should "be absolutely entitled to the business of stevedoring all ships which should arrive in the port of *Melbourne* consigned to the firm of *Dalgety, Blackwood, & Co.*," and that each of the other parties (using the words above cited as to each) should be absolutely entitled to the business of stevedoring all ships which should arrive in the port consigned to certain other firms, viz., the Defendant to those consigned to *J. H. White & Co.*, *Johnson* to those consigned to *MacFarlane & Co.*, and the Plaintiff to those consigned to *Holmes, White, & Co.*, *R. Towns & Co.*, and *King, Meng, & Co.*, and that the parties should be absolutely entitled for their own use to the profits arising from such stevedoring respectively. This first covenant concludes as follows:—"And neither of them the said several parties hereto shall not (*sic*),

(1) 4 H. & N. 643. (2) 1 Q. B. D. 563.
(3) 1 H. & C. 72; 31 L. J. (Ex.) 398.

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nor will, save as hereinafter expressly provided, undertake or be in any way concerned in or interfere in the stevedoring, either in whole or in part, of any ship or vessel consigned to any of the said persons or firms hereinbefore particularly mentioned otherwise than according to the provision in that behalf hereinbefore contained."

The second and third clauses of the deed are in the following terms:—

"2. That if any or either of the said firms hereinbefore named shall refuse to allow the stevedoring of any ship or ships consigned to them to be done by the party who, under the last preceding clause shall be entitled thereto, but shall require any other or others of the said parties hereto to do the stevedoring thereof, then and in such case such party so required shall and will give an equivalent to the person who shall lose the stevedoring of such ship or ships, such equivalent to be determined, in case of disagreement between the parties, by two disinterested persons, to be nominated by Mr. *James Allison Crane*, and an umpire to be named by such arbitrators, in case they disagree.

"3. That the stevedoring of all ships not consigned to any of the hereinbefore mentioned firms shall be taken and stevedored in the following order; that is to say, the first ship to arrive after the date hereof to be stevedored by the said *John Kindlan Collins*, the second by the said *Francis Robbins*, the third by the said *George Washington Robbins*, and the fourth by the said *Alfred Joseph Johnson*, and so on in such order during the continuance of these presents, it being expressly agreed that the said *James Locke* shall not be entitled to the stevedoring of any ships or vessels save those consigned to the said firms of *Holmes, White, & Co.*, *R. Towns & Co.*, and *King, Meng, & Co.*"

The above clauses disclose the object and nature of the contract, but questions arose on other clauses of the deed.

The fifth clause provides that if any of the firms mentioned in the first clause should cease to carry on business, or if the number of ships consigned to any of them should be materially diminished, a readjustment should be made of the distribution of the ships, and in case any firm should cease to carry on business, the party losing

such firm should be entitled to make a selection of another firm in *Melbourne*, subject to arbitration in case of disagreement.

The 9th clause is a covenant for the payment of £1000 as liquidated damages for the breach of any of the covenants, and the 10th contains a provision for the submission of disputes to arbitrators, the terms of which will be more fully referred to hereafter.

R. Towns & Co., one of the firms assigned to the Plaintiff, was dissolved, and a new firm, *Stewart, Couch, & Co.*, succeeded to its business, and was selected by the Plaintiff under the clause of the agreement above referred to.

The declaration, after setting out the deed, alleged three breaches. The first and second have been abandoned by the Plaintiff's counsel, and the action is thus reduced to the last breach. The averments which precede that breach allege that the Plaintiff had selected *Stewart, Couch, & Co.* in the place of *R. Towns & Co.*, that certain ships arrived in *Melbourne* consigned to *Stewart, Couch, & Co.*, and that although that firm did not refuse to allow the stevedoring of these ships to be done by the Plaintiff, yet the Defendant did the stevedoring of them, whereby the Plaintiff lost the profit which would otherwise have accrued to him.

On the first plea nothing arises. The second denies the breaches. The third sets out the arbitration clause, and avers that no arbitrators had been appointed, nor award made. The fourth sets out the deed at length, and avers that there was no consideration for it, save as appears by the deed; the object of the plea being to raise the question that the deed was void as being in restraint of trade. The fifth denies that the Plaintiff selected *Stewart, Couch & Co.* in place of *R. Towns & Co.;* and the last plea avers that the other parties to the deed did not agree to such selection.

The Plaintiff demurred to the third and fourth pleas, and took issue on the others.

The particulars in the action mentioned three ships, the *Jason, Clara,* and *Eastern Monarch,* as having been stevedored by the Defendant in breach of the agreement, but it has been admitted that the action is not maintainable in respect of the *Jason.*

The evidence given at the trial was short and meagre. The

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following are the facts appearing upon it, so far as they are material to the points remaining to be decided upon this appeal.

The *Clara* arrived at *Melbourne* consigned to *Stewart, Couch, & Co.* No question arises upon the unloading, which was done by the Plaintiff. The *Clara* then passed out of the hands of *Stewart, Couch, & Co.* into those of *Poole, Picken, & Co.*, who employed the Defendant to stevedore her for the outward voyage, which he did.

The *Eastern Monarch* also arrived at *Melbourne* consigned to *Stewart, Couch, & Co.* The Defendant both loaded and unloaded her. *Stewart, Couch, & Co.* had nothing to do with the stevedores. This ship also passed into the hands of other merchants, viz., *Bright* and *J. H. White*, who employed the Defendant to load her. It does not appear who were the persons who employed him to unload the ship.

A verdict was found for the Plaintiff, with the following damages: viz., £125 for the *Clara*, and £155 for the *Eastern Monarch*. A rule *nisi* was obtained to set aside the verdict and enter it for the Defendant, on the ground that the third plea was proved, or to reduce the damages to £20, on the ground that under the terms of the agreement the Plaintiff was only entitled to recover the profit of unloading the *Eastern Monarch*.

The other points referred to in the rule relate to the breaches which are now abandoned.

The Supreme Court, after argument, discharged the above rule, and has also given judgment for the Plaintiff upon the demurrers to the third and fourth pleas.

There was really no issue in fact taken upon the third plea, and no verdict could properly be entered upon it. The question on it is raised by the demurrer.

The point as to the reduction of the damages depends upon what may be held to be the right construction of the agreement. It was contended on this point by the Defendant that the agreement was confined to the work done for ships whilst in the hands of those who were the consignees on their arrival in the port; but this would not seem to have been the intention of the parties, to be gathered from the general tenor and the particular language of the agreement. The ships allotted to each of the parties are

"those which shall arrive in the port of *Melbourne* consigned to particular firms." This language is apparently used to describe the class or set of ships to which each party is to be absolutely entitled until their next departure from the port.

The agreement, particularly with reference to clause 3, seems to be an attempt to make provision for distributing the stevedoring business of all ships arriving in the port amongst the parties to the deed, and one mode adopted for ascertaining the set or class of ships to which each is to be entitled is by reference to the firms to which ships are on arrival consigned. It is of course quite usual, and is shewn to be so by the evidence given in the case, that ships should be chartered or loaded by others than the original consignees; and if the Defendant's construction of the agreement were correct, it would follow that the parties would have provided only for the unloading of ships upon which there is comparatively little profit, and would in many, if not in most cases, have left out of their agreement the larger and more profitable business of loading them with the outward cargoes.

Their Lordships, therefore, agree with the Judges of the Supreme Court in the construction they have placed upon the agreement on this point, and think that so much of the rule as prayed for a reduction of damages was rightly discharged. They may, however, observe here that the Plaintiff, who insists on the construction which enables him, if the action is otherwise maintainable, to retain the full amount of damages awarded by the jury, cannot escape from the effect of this construction upon the question of the validity of the agreement with reference to the objection that it is void as being in restraint of trade.

That question arises on the demurrer to the fourth plea.

The objects which this agreement has in view are to parcel out the stevedoring business of the port amongst the parties to it, and so to prevent competition, at least amongst themselves, and also, it may be, to keep up the price to be paid for the work. Their Lordships are not prepared to say that an agreement, having these objects, is invalid if carried into effect by proper means, that is, by provisions reasonably necessary for the purpose, though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade.

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The questions for consideration appear to them upon the authorities to be, whether and how far the prohibitions of this deed, having regard to its objects, are reasonable.

The numerous cases which have been decided on this subject are collected in the notes to *Mitchel* v. *Reynolds* in the first volume of *Smith's* Leading Cases. It may be gathered from them that agreements in restraint of trade are against public policy and void, unless the restraint they impose is partial only, and they are made on good consideration, and are reasonable. The Courts are not disposed to measure the adequacy of the consideration, if a real and *bonâ fide* consideration exists, and the modern decisions have mostly turned on the question of the reasonableness of the restraint in relation to the objects of the contract. It was said by Lord *Ellenborough*, in delivering the judgment of the Court in *Gale* v. *Reed* (1), "The restraint on one side meant to be enforced should in reason be co-extensive only with the benefits meant to be enjoyed on the other." He went on to say, "As the carrying the restraint further would be arbitrary and useless between the parties, a construction which would have that effect must be reluctantly resorted to," and for that reason a construction which would not have this effect was given to the particular agreement in that case.

In the case of *Horner* v. *Graves* (2), *Tindal*, C.J., in delivering the judgment of the Court, said: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either, it can only be oppressive, and, if oppressive, it is in the eye of the law unreasonable."

The law as to the reasonableness of the restraint in contracts of this kind was very fully considered in the judgment of the Court of Exchequer in the case of *Mallan and Others* v. *May* (3). There by a deed under which the Defendant became assistant to the

(1) 8 East, 86. (2) 7 Bing. 743.
(3) 11 M. & W. 653.

Plaintiffs in their business of surgeon dentists, he covenanted that he would not carry on that business in *London*, "or in any of the towns or places in *England* or *Scotland* where the Plaintiffs might have been practising before the expiration of the Defendant's service." The declaration contained two breaches; the first for practising in *London*, the second for practising in another place where the Plaintiffs had practised. The Court adopted the principle of the decision in *Horner* v. *Graves* (1), and holding the contract to be divisible, decided that the prohibition against practising in *London* was reasonable and good, but that the covenant against practising in other towns and places went beyond what the protection of any interests of the Plaintiffs required, and was, therefore, an unreasonable restriction. The Court accordingly gave judgment for the Plaintiffs on the first breach, and for the Defendant on the second. The principles on which this case was decided were upheld by the Exchequer Chamber in *Price* v. *Green* (2).

Applying the rule to be collected from the authorities, it appears to their Lordships that the provision contained in the second clause of the deed, viz., that if either of the named persons should refuse to allow the stevedoring of any ship to be done by the party entitled to it under the first clause, and should require one of the other parties to do it, such party so required should give an equivalent to the party who lost the stevedoring, to be determined by arbitrators, is not unreasonable, since it provides in a fair and reasonable way for each party obtaining the benefit of the stevedoring of the ships to which by the contract he was to be entitled. Each party might in turn derive benefit from this clause, and one of the four firms would always get the profit of the ship stevedored, though the work might be done by another of them. As regards the merchant, also, he can have his ship stevedored by the party whom he may require to do it, at least there is no prohibition against his having it so done.

But the operation of the covenant at the end of the first clause, upon which the third breach in the action is founded, is productive of wholly different results. That covenant is only modified by clause 2 as regards the original consignees, and therefore in

(1) 7 Bing. 743. (2) 16 M. & W. 346.

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the case of ships passing out of the hands of the named firms to which they were consigned on arrival, and being chartered or loaded by other merchants (which is the present case), the effect of the covenant is, that as to such ships, if the merchants loading them should not choose to employ the party to the agreement who, as between themselves, was entitled to do the stevedoring, all the parties to the agreement are deprived of the work; in the words of Mr. Justice *Fellows* such ships are, "so to speak tabooed to them all." The covenant in such cases restrains three of the four parties to the agreement from exercising their trade, without giving any profit or benefit to compensate for the restriction to either of the four, whilst the combination they have thus entered into is obviously detrimental to the public, by depriving the merchants of the power of employing any of these parties, who are probably the chief stevedores of the port, to load their ships, unless in each case they employ the one of the four to whom the ship, as between themselves, has been allotted, however great and well founded their objections may be to employ him. Such a restriction cannot be justified upon any of the grounds on which partial restraints of trade have been supported. It is entirely beyond anything the legitimate interests of the parties required, and is utterly unprofitable and unnecessary, at least for any purpose that can be avowed.

Yet a construction of the clause producing the above-mentioned consequences is that on which the Plaintiff insists, and on which he is compelled to rely to sustain his only remaining breach. He is not in a position to maintain his action upon the second clause of the agreement, because *Stewart, Couch, & Co.* did not refuse to employ him to do the work, and even if he could have brought his case within that clause, he must have failed in this action, because, as was rightly held by the Court below in dealing with the second breach, the action will not lie under clause 2 until the amount of the equivalent to be paid has been ascertained in the manner required by that clause.

The part of the agreement which is open to objection, though differing in its circumstances and in the degree of the restraint which it imposes on the freedom of trade, is not distinguishable in its nature from that which was held to be void in *Hilton* v.

Eckersley (1); whilst it cannot be justified on the ground upon which Mr. Justice *Erle* (who differed from the majority of the Court) thought the contract in that case might be supported, viz., that it might be necessary for the protection of the lawful interests of the parties. The object of the contracting parties in that case was to protect their interests as masters against combinations of workmen by an agreement to conduct their works, or wholly or partially to suspend them for a time, as the majority should resolve; and the learned Judge thought that this object justified the mutual restraint of trade which they imposed on each other.

Upon the construction, therefore, which the Plaintiff has placed upon the covenant in question, and which upon the whole their Lordships are of opinion is correct, they think, for the reasons above stated, that it creates an unreasonable restraint upon the parties in their trade, and ought not to receive the aid of the Courts to enforce it. They have already said that this objection does not apply to clause 2 of the deed, and they consequently think that judgment on the demurrer to the fourth plea should be entered for the Defendant as to the first and third breaches, but for the Plaintiff as to the second breach.

The remaining question is that raised by the demurrer to the third plea, though, after the opinion which their Lordships have just expressed, the decision of it is only material as regards costs.

The question so raised is, whether the general arbitration clause (clause 11) affords an answer to the action, there having been no arbitration and no award under it.

Since the case of *Scott* v. *Avery*, in the House of Lords (2), the contention that such a clause is bad as an attempt to oust the Courts of jurisdiction may be passed by. The questions to be considered in the case of such clauses are, whether an arbitration or award is necessary before a complete cause of action arises, or is made a condition precedent to an action, or whether the agreement to refer disputes is a collateral and independent one. That question must be determined in each case by the construction of the particular contract, and the intention of the parties to be collected from its language. The provision in the second clause of this contract falls, as their Lordships have already said, within

(1) 6 E. & B. 47; Ibid. 67. (2) 5 H. L. C. 811.

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the first-mentioned category, because the equivalent to be given in lieu of the profit would not be payable until the amount of it had been ascertained in the manner prescribed. But the 11th clause, according to the intention to be collected from the whole deed, appears to them, though by no means with clearness, to be a collateral and independent agreement. It extends to all doubts, differences, and disputes which should arise touching the agreement, and stipulates that all matters in difference should be submitted to arbitrators.

The learned counsel for the Defendant strongly relied on the part of the clause which is in these words,—"And the award of the arbitrators shall be conclusive, and any of the parties shall not be entitled to commence or maintain any action at law or suit in equity in respect of the matters so submitted as aforesaid, except for the amount or amounts by the said award determined to be paid by any one or more of the said parties to the other or others of them, or otherwise in accordance with the terms and conditions of the said award, as to the acts or deeds to be made, done, executed, and performed."

This passage, no doubt, contains negative words, but there is ambiguity in the words "in respect of the matters so submitted as aforesaid," as to whether they were meant to apply to all matters which were to be submitted to arbitrators under the clause, or to the matters which, after they arose, had been specifically submitted in the manner prescribed. Looking out of this clause, it is material to consider clause 9, which is as follows,—"That in case of any breach or non-performance by any of the parties hereto of any or either of the covenants or agreements hereinbefore contained, such party so committing such breach, or not performing such covenant or agreement, shall and will well and truly pay unto each of the other parties hereto respectively, their or his executors, administrators, or assigns, the sum of one thousand pounds, as and for liquidated damages for such breach or non-performance, but without prejudice nevertheless to the right of any of the said parties hereto to enforce the specific performance of the covenants and agreements hereinbefore contained, or any or either of them."

It may be inferred from this clause that the parties contem-

plated that an action might be brought for these damages, and with reference to the proviso to the clause, that they intended to reserve the right to bring a suit for specific performance. Their Lordships are, therefore, disposed to think that the negative words in the arbitration clause were only intended to apply to matters actually submitted to arbitration. They will not, therefore, disturb the judgment of the Court below on this point.

The other points mentioned by the Appellant's counsel were disposed of during the argument.

In the result, their Lordships are of opinion that the rule *nisi*, so far as it prays to enter the verdict for the Defendant on the first and second breaches, should be made absolute, and as to the rest should be discharged; that the judgment for the Plaintiff on the demurrer to the third plea should be affirmed; and that the judgment for the Plaintiff on the demurrer to the fourth plea should be reversed as to the 1st and 3rd breaches, and judgment entered as to these breaches for the Defendant, and they will humbly advise Her Majesty accordingly.

The Appellant having succeeded only on the point of the partial invalidity of the agreement, in respect to which both parties are equally in fault, their Lordships will make no order as to the costs of this appeal.

Solicitor for the Appellant: *H. T. Roberts.*
Solicitors for the Respondent: *Clayton, Son, & Fargus.*

[PRIVY COUNCIL.]

J. C.*
1879
July 10, 11, 12, 26.

ALTAMONT DE CORDOVA, JULIA DE CORDOVA, AND ISAAC HENRY DE MERCADO . . . . . } DEFENDANTS;

AND

SOLOMON DE CORDOVA . . . . . PETITIONER.

ON APPEAL FROM THE HIGH COURT OF CHANCERY, JAMAICA.

Compromise by Executors of Debt due by one of themselves—Fraud—Settlement in Account—Liability of Executors.

A. C., being one of several executors, a debtor to his testator's estate in the sum of £20,130, and entitled to one-sixth of the said estate (estimated at £6000) as legatee under the will, agreed with his co-executors, in accordance with the terms of the will and without objection from the parties interested, to set off the said £6000 against the like amount of the debt then payable by him, at the same time paying about £1000 in cash. Thereafter having become insolvent, *A. C.* agreed, by way of compromise with his creditors, including the said executors, that they should accept 5*s.* in the pound in full of their demands, secretly arranging with some of the said creditors to pay to them further sums if he should be in a position so to do, and subsequently paying to them, or some of them, further sums. For the purposes of the compromise the debt due to the testator's estate was treated by the executors as amounting to £19,808, thus in effect reviving the debt of £6000 which had been previously discharged, and accepting in respect of it a composition of 5*s.* in the pound; and the executors also treated as revived *A. C.'s* right to one-sixth of the testator's estate.

In a suit brought by a legatee against the executors, all of whom proved the will, *held*, that the above agreement of set-off extinguished *A. C.'s* debt *pro tanto*, and had the same effect as if *A. C.* had paid £6000 in cash. It also extinguished *A. C.'s* right under the bequest, unless it should turn out that the one-sixth share exceeded the estimated £6000, and subject to his liability to refund *pro tanto* in case the same should fall short of the estimated £6000.

Held, also, that the agreement of compromise was a breach of trust and void as against the Plaintiff, and that it was fraudulent as regards *A. C.* The secret arrangement, though not legally binding, was sufficient to vitiate the compromise.

Held, further, that whether or not a compromise by executors of a debt due from one of themselves will be excused and upheld if beneficial to the

* *Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR JAMES HANNEN.

estate, the above compromise and the mode in which it was carried out as above were injurious to the estate and to the Plaintiff, and that the Plaintiff, in the absence of any consent or acquiescence by him, was not bound thereby.

Held, further, that *A. C.* was liable to the estate for the full amount of what would have been due and payable by him if the compromise had never been effected, and that the co-executors were severally liable for so much of the said amount as would or might at any time have come to their hands but for their wilful neglect and default.

It is not necessary to direct an inquiry previous to charging the Defendants as for wilful neglect and default.

The executors having been directed by the will to sell the real estate, if they allowed one of their number to hold stores and buildings at less than a fair occupation rent, are chargeable with what would have been a fair occupation rent.

A house and premises having by the will been given to the widow for life without impeachment of waste, an inquiry was directed whether any charge for money expended thereon by the executors ought to be allowed or not, having regard to the circumstances under which the expenditure was made.

Interest on sums decreed allowed at 6 per cent.

APPEAL from a decree of the Vice-Chancellor of *Jamaica* (Sept. 3, 1877).

The facts of the case and the nature of the suit are sufficiently stated in the judgment of their Lordships.

The decree appealed from, *inter alia*, declared the will of *Aaron de Cordova* established, and ordered that the trusts thereof be carried into execution, and that the release hereinafter referred to and dated the 20th of January, 1868, from the Appellants, as executors of the said *Aaron de Cordova*, to the Appellant *Altamont de Cordova*, be set aside as against the Respondent as a fraudulent breach of trust. It also declared that the Appellants were severally liable and responsible to the estate of the testator as between themselves and the Respondent for the full amount thereby proposed or intended to be abandoned and given up by them to *Altamont* with interest. It also declared that an alleged stated account, dated the 28th of February, 1870, between the Appellants and Respondent and signed by the latter, did not bind the Respondent, and that the same should be opened. It also declared the Appellants guilty of a devastavit in returning an inventory of their testator's personal estate at an undervalue, and in compromising the debt due by *Altamont*. And it directed

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various accounts, the nature of which, so far as they are material, appears in the judgment of their Lordships.

Mr. *North*, Q.C., and Mr. *Solomon*, for the Appellants:—

The compromise of the 20th of January, 1868, was on the evidence entered into in good faith, and was beneficial to the testator's estate. Under such circumstances, the executors could compromise the debt of one of them. See *Blue* v. *Marshall* (1); *Pennington* v. *Healey* (2); *Forshaw* v. *Higginson* (3).

If the compromise cannot be supported, the Appellants, or at least the Appellants other than *Altamont*, cannot be held liable in respect of *Altamont's* debt for more than would have been recovered for the testator's estate if that compromise had not been made, and there is no evidence to shew that more could have been recovered than was in fact recovered by the compromise. At the utmost, before charging the Appellants other than *Altamont*, an inquiry should have been directed whether the whole or any part thereof could have been recovered; and had such inquiry been directed, the Appellants would have been able to shew that part of the debt certainly could not have been recovered. See *Mucklow* v. *Fuller* (4); *Tebbs* v. *Carpenter* (5) and two cases there cited; *Powell* v. *Evans* (6); *Lowson* v. *Copeland* (7); *Stiles* v. *Guy* (8); *Maitland* v. *Bateman* (9); *Edmonds* v. *Peake* (10); *East* v. *East* (11); *Caney* v. *Bond* (12); *Clack* v. *Holland* (13); *Hobday* v. *Peters* (14); *Bullock* v. *Wheatly* (15); *Wiles* v. *Gresham* (16). *Coope* v. *Carter* (17) is an authority that at least one act of wilful neglect or default must be alleged and proved in order to obtain a decree directing an inquiry as to wilful neglect or default. With regard to the signed account of the 28th of February, 1870, the

(1) 3 P. Wms. 381.
(2) 1 C. & M. 402.
(3) 8 De G. M. & G. 827.
(4) Jac. 198.
(5) 1 Madd. 290, 297.
(6) 5 Ves. 843.
(7) 2 Bro. C. C. 157.
(8) 1 Mac. & G. 422; 4 Y. & C. (Ex.) 571; 16 Sim. 230.
(9) 8 Jur. 896; S. C. 16 Sim. 233, n.
(10) 7 Beav. 239.
(11) 5 Hare, 348.
(12) 6 Beav. 486.
(13) 19 Beav. 262, 271.
(14) 28 Beav. 354.
(15) 1 Coll. 130–136.
(16) 2 Drew. 258; 5 De G. M. & G. 770.
(17) 2 De G. M. & G. 292.

decree is erroneous in opening it. The same was on the evidence approved and signed by the Respondent after mature consideration, and deliberately, with full knowledge of the circumstances. The Respondent also acquiesced therein for upwards of six years, and did not by his pleadings refer to such account. The decree was also erroneous, as urged in the fifth ground of appeal, in declaring that the Appellants were guilty of a devastavit in returning an inventory of their testator's estate at an undervalue. The inventory was founded upon valuations, and was made in manner prescribed by law; and if the facts are as the Appellants allege, it was not at an undervalue. The decree was also erroneous in ordering that the Appellants be charged with a fair occupation rent of such stores and buildings belonging to the testator's estate as have since his death been occupied by *Altamont*. Neither of the other Appellants have been in occupation thereof, or of any part thereof. Again, the Appellants ought to be allowed moneys expended in repairs or improvement of house and premises devised by the testator to his widow for life. A tenant for life without impeachment of waste is not bound to repair, and therefore the Appellants as executors and trustees were entitled and bound so to do: *Marquis of Lansdowne* v. *Marchioness of Lansdowne* (1); *Powys* v. *Blagrave* (2). The cases cited by the Vice-Chancellor, *Hibbert* v. *Cooke* (3), *Nairn* v. *Majoribanks* (4), and *Caldecott* v. *Brown* (5), are distinguishable. See *Dent* v. *Dent* (6). The rate of interest charged was excessive: *Robinson* v. *Robinson* (7).

Mr. *Mackeson*, Q.C., and Mr. *Whitehorne*, for the Respondent:—

Upon the evidence the compromise and release of the 20th of January, 1868, is fraudulent and void, and a breach of trust, and should be set aside: see as to the effect of the secret arrangement *Mare* v. *Sandford* (8); *Wood* v. *Barker* (9); *M'Ewen* v. *Sanderson* (10). The Appellant *Altamont* is therefore liable to pay the whole of the debt due by him to the testator's estate. As regards the Appellant and his co-executors, they committed a devastavit

(1) 1 Jac. & W. 522.
(2) 4 De G. M. & G. 448.
(3) 1 S. & S. 552.
(4) 3 Russ. 582.
(5) 2 Hare, 144.
(6) 30 Beav. 363.
(7) 1 De G. M. & G. 247.
(8) 1 Giff. 288.
(9) Law Rep. 1 Eq. 139.
(10) Law Rep. 20 Eq. 65.

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in not getting in the debt due by *Altamont*, and are therefore severally liable to make good the amount thereof. Upon the evidence, it appeared that *Altamont's* debt could have been recovered by his co-executors if they had taken proper measures to call it in. Further, the Appellants, having allowed *Altamont* to retain his one-sixth share of the testator's estate, estimated on the footing that the whole of his debt to the estate was a good asset, were precluded from entering into an arrangement with him whereby they accepted 5*s.* in the pound in full discharge of his debt. As regards wilful neglect and default, an immediate decree may be made for an account on that footing without alleging and proving any single case. If executors are passive, that may amount to *crassa negligentia*. In every one of the cases cited on the other side the executor was insolvent; there was no fraud, no acts of commission, and yet no inquiry was directed. The *onus* is not on the Plaintiff to shew that the money could have been got in; it is on the executor to shew that it could not: see *Grove* v. *Price* (1); *Wiles* v. *Gresham* (2); *Jevon* v. *Bush* (3); *East* v. *East* (4); *Ratcliffe* v. *Winch* (5); *Caney* v. *Bond* (6); *Candler* v. *Tillett* (7); *Jones* v. *Morrall* (8); *Massey* v. *Massey* (9). Even if one executor can release the debt of another, still, where executors have appropriated a legacy to the legatee, they cease to be executors, and have become trustees thereof, and then one trustee cannot release the debt of another: *Phillipo* v. *Munnings* (10); *Charlton* v. *Earl of Durham* (11); *Dix* v. *Burford* (12). Further, the Appellants committed a devastavit in undervaluing the testator's estate in the inventory returned by them to the office of the Secretary of *Jamaica*, and in particular in valuing the debts due to the testator at £12,549, when there was due from *Altamont* £20,130, and from *Michael de Cordova* £3478.

The signed account of the 28th of February, 1870, was not, on the evidence, binding upon the Respondent as a settled account,

(1) 26 Beav. 103.
(2) 5 De G. M. & G. 770.
(3) 1 Vern. 342.
(4) 5 Hare, 348.
(5) 17 Beav. 217.
(6) 6 Beav. 486.
(7) 22 Beav. 263.
(8) 2 Sim. N. S. 249.
(9) 2 J. & H. 734.
(10) 2 My. & Cr. 315.
(11) Law Rep. 4 Ch. 433.
(12) 19 Beav. 409.

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nor was there any proof of implied acquiescence: see *Sleight* v. *Lawson* (1); *Stackhouse* v. *Barnston* (2). With regard to the breach of trust in paying money out of the trust estate for the repairs of the house left to the widow for life, there is a distinction between repairs and improvements, and no case has sanctioned the application of capital moneys to the former: see *Lewin* on Trusts [7th ed.], 503, 5; *In re Leigh's Estate* (3); *Vyse* v. *Foster* (4).

Mr. *North*, Q.C., replied.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from a decree of the Vice-Chancellor of *Jamaica*, in a suit instituted by the Respondent as a legatee under the will of his father *Aaron de Cordova*, deceased, against the Appellants, who were the executors and executrix of the testator.

To prevent confusion, the Respondent in the appeal will hereinafter be called the Plaintiff, and the Appellants the Defendants.

The will was dated the 10th of July, 1865, and the purport of it is fully set forth in the careful and elaborate judgment of the learned Vice-Chancellor.

It is sufficient to state here that the testator, after directing payment of his debts and funeral expenses, and amongst other legacies one-sixth part or share of all his estate to his son *Altamont*, and £200 to his son *Solomon*, the Plaintiff, gave and devised all the rest, residue, and remainder of his estate, both real, personal, and mixed, unto and to the use of his executors and executrix, upon trust as to his house in *Duke Street*, in the city of *Kingston*, and all the furniture, &c. therein, to permit and suffer his wife to use, occupy, possess, and enjoy the same, or to receive and take the rents, issues, and profits thereof during the term of her natural life, without any impeachment of waste, and immediately upon the death of his said wife, to sell the same in such manner as his said executors, or the survivors or survivor of them, or the heirs of such survivor should think fit.

(1) 3 K. & J. 292.
(2) 10 Ves. 466.
(3) Law Rep. 6 Ch. 887.
(4) Law Rep. 8 Ch. 309; 7 H. L. 318.

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The will then proceeds,—"And as to all the rest of my said trust estate, to sell and dispose of, and convert into money as speedily as possible, so much thereof as shall be in its nature saleable, and to collect, get in, and receive the residue thereof. And to stand and be possessed of all moneys hereinafter referred to as trust moneys, to arise from all such sales, disposals, conversions, collections, and receipts of my said trust estate. Upon trust as to so much thereof, and such sum as shall, together with the said sum of £200 bequeathed to my son *Solomon*, and such sum as shall appear by my books of account to be due to me by him (notwithstanding that such last-mentioned sum, or any part thereof, shall have been discharged and satisfied by operation of law) amount to and equal one-sixth part or share of and in all my estate to lay out and invest the same in the names or name of my said executors and executrix, or of the survivors or survivor of them, or of the heirs, executors, or administrators of such survivor, in some one or more of the public stocks or funds of *Great Britain*, or this island, or at interest upon Government or real securities in *Great Britain* or this island, and to stand and be possessed of and interested in such stocks, funds, and securities, and the interest, dividends, and annual produce thereof upon trust thereout, so long as the same shall last, to pay unto my said son *Solomon* yearly the sum of £240 by twelve even and equal monthly payments, the first payment to be made one month after my death, and immediately after the death of my said son *Solomon* to transfer and deliver the said stocks, funds, and securities, or so much thereof as shall then be existing and remaining unconsumed by such yearly payments as aforesaid, unto the widow and children (if any) of my said son *Solomon;* but if he shall leave no widow or child him surviving, then to hold the residue of the said stocks, funds, and securities (if any) upon the same and the like trusts as hereinafter expressed and declared of and concerning the balance of the said trust moneys."

The said will then declared trusts of the balance of the trust moneys for the benefit of the widow and four younger children of the testator, and then proceeded as follows:—

"I declare and direct that any legatee or executor named in this my will, who shall at the time of my decease owe me any

money, shall account for the same to my executors and executrix."

The testator died on the 8th of July, 1866. He had been twice married, and left two sons by his first wife, viz., the Plaintiff, who was his eldest son, and the Defendant *Altamont*. His second wife, *Julia de Cordova*, one of the Defendants, who was appointed executrix of his will, survived him. He also left by his said second wife, two sons, *Alfred* and *Eustace*, and two daughters, *Ella* and *Fleurette*.

Prior to the year 1863 the Defendant *Altamont* carried on business in partnership with his father the testator, who in that year retired and sold his share in the business to his son *Altamont* for a sum of which £17,716 odd remained unpaid at the time of the death of the testator. That amount was secured by six promissory notes of the Defendant *Altamont*, dated the 3rd of August, 1863, for the respective amounts following, that is to say:—

One for £5000, due on the 10th of August, 1866.
One for £2500, due on the 10th of August, 1867.
One for £2500, due on the 10th of August, 1868.
One for £2500, due on the 10th of August, 1869.
One for £2500, due on the 10th of August, 1870.
And one for £2716. 3*s.*, due on the 10th of August, 1871.

Each of the notes bore interest at 6 per cent., from the 1st of August, 1864, payable yearly. In addition to the said promissory notes and a balance of interest amounting to about £1000 due thereon, *Altamont* was indebted to the testator, at the time of his death, in a sum of £2414. 1*s.* 5*d.*, on open account, making a total, exclusive of interest, of £20,130 odd.

The Plaintiff was, at the testator's death, indebted to him in a sum of £1968. 7*s.* 8*d.*

The testator's other assets consisted of debts due to him, including a debt from one *Michael de Cordova*, the house and furniture and effects specifically given by the will, and other real estate, and certain investments, some of which were on foreign securities.

All the Defendants proved the will, and thereby took upon themselves the execution thereof.

Shortly after the death of the testator, the Defendants prepared a balance sheet of the estate. The net assets, including the debt

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from *Altamont*, were estimated at £36,000. *Altamont* claimed to set off one-sixth of that amount bequeathed to him by his father's will against the amount due on the promissory note which matured on the 10th of August, 1866, and the sum owing from him on open account. His co-executor, the Defendant *De Mercado*, opposed this claim at first, but discontinued his opposition upon being advised that the claim was well founded. A settlement was accordingly concluded by which it was arranged that the legacy, estimated at £6000, should be set off against the like amount of the debt then payable by *Altamont*.

That settlement, in their Lordships' opinion, extinguished, to the extent of £6000, *Altamont's* debt, and also any right which he had under the bequest in his father's will, unless it should turn out that the assets exceeded the amount at which they were then estimated. He was also liable to refund *pro tanto* in case the assets should fall short of the amount at which they were estimated, and according to which his share of the property under his father's will was treated as amounting to £6000, the sum allowed in the settlement on account. It was said in the argument of the learned counsel for the Defendants that the settlement in account was a mere paper transaction, but a paper transaction of this nature is merely a representation on paper of that which is treated by the parties as having actually taken place. By setting off one debt against another of equal amount both are extinguished. A settlement of a debt in account amounts to the same thing as a payment: *Skyrmg* v. *Greenwood* (1), and *Bramston* v. *Robbins* (2). Their Lordships consider that the settlement in account had the same effect as if *Altamont* had paid £6000 of the debt then due and payable by him to the estate, and the Defendants, as executors, had with the assets so received paid him the then estimated amount of his legacy, subject to his liability to refund *pro tanto* in case the assets should fall short of the estimated amount.

Neither of the parties have contended by their counsel before their Lordships that the settlement in account was not in accordance with the testator's will, by which he declared that any legatee who should owe him any money should account for the same with his executors. Their Lordships are of opinion that it was binding

(1) 4 B. & C. 281. (2) 4 Bing. 13.

upon *Altamont*, and also upon his co-executors, who assented to it, and the Plaintiff has not objected to it. If the settlement did not amount to a discharge in full of the £6000 of the debt then payable, the executors would be liable for allowing that portion of the debt to remain outstanding from the time of the death of the testator in 1866, when *Altamont* was solvent, up to the date of the compromise in 1868, when he is said to have been insolvent. According to *Altamont's* own evidence he was solvent at the time of his father's death. His liabilities to the estate were estimated by the executors as of the value of 20*s.* in the pound, and his legacy was calculated and allowed upon that basis. Further, in a conversation which *Altamont* had with his brother, the Plaintiff, before the latter left for *America*, he said, "You can go away making your mind perfectly easy, for if you live for ninety-nine years your money is safe, and you will always receive your twenty pounds a month." It appears that, in addition to the £6000 of *Altamont's* debt discharged by the settlement, *Altamont* paid to the estate in cash about £1000 on account. Other evidence puts the amount paid at about £916, but the difference is not a matter of importance.

This brings their Lordships to the consideration of the effect of the compromise which took place in January, 1868.

It appears from the evidence of *Altamont* that in the course of the year 1867 he sustained heavy losses in his business, and by reason thereof became embarrassed in his circumstances and unable to meet his engagements. In the month of August, 1867, the Appellant *De Mercado* made frequent applications to him to him to pay the £2500 due on the promissory note which became payable in that month, but such applications were unsuccessful. On the 20th of January, 1868, an arrangement was made between the Appellant, *Altamont*, and his principal creditors, including himself and the other Defendants as executors and executrix of his father's will, which was embodied in a letter addressed to his firm of *Altamont De Cordova & Co.* The letter was in the following terms:—

"*Kingston, Jamaica*, 20th January, 1868.

"Messrs. *Altamont De Cordova & Co.*,

"Dear Sirs,—Having investigated your statement and account

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in connection with your business, we have to express ourselves satisfied as to the fact that the unfortunate result has been brought about by serious losses which accrued during the recent panic, and we hereby agree to accept as a compromise in full of our demands the sum of five shillings in the pound, payable by your acceptances at three and six months, and a transfer of the debt of Mr. *W. Knaggs* in trust for our benefit. It being understood that this arrangement on our part shall only hold good in the event of all your creditors, to whom your matters have been submitted, according to the arrangement, namely,—

"*Colonial Bank.*
"Executors of the estate of *Aaron De Cordova.*
"*Charles Levy & Co.*
"*Davidson, Coulthurst, & Co.*
"*Nunes Bros.*
"*Alberga Brothers, & Sons.*
"*Lewis Leon, London,* and
"*Henry De Cordova & Co., New York.*

"We further consent to your proposition that you pay all your other small creditors in full, and agree to sign a more formal document to the same effect at any time we may be called upon so to do."

The letter was duly signed by or on behalf of all the creditors mentioned therein, and it is admitted by the Defendants that it was signed by all of them as executors of the testator.

The principal question to be determined in the present appeal is, was that compromise valid and binding upon the Plaintiff. The other legatees in the will do not object to it.

The learned Vice-Chancellor has declared and decreed that it was a breach of trust and void as against the Plaintiff.

Their Lordships are of opinion that that portion of the decree is correct, and that it must be upheld.

It was admitted by the learned counsel for the Defendants that he could not refer to any decision that executors can compromise a debt due from one of themselves.

The case of *Cooke* v. *Collingridge* (1), cited by the Vice-Chan-

(1) 1 Jac. 607.

cellor, seems to be decisive upon the question that an executor cannot compromise a debt due from himself to the estate.

In that case Lord *Eldon*, in the passage quoted by the Vice-Chancellor, said,—"One of the most firmly established rules is that persons dealing as trustees and executors must put their own interests entirely out of the question, and this is so difficult in a transaction in which they are dealing with themselves that the Court *will not inquire whether it has been done or not, but at once say that such a transaction cannot stand.*" It is treated as a breach of trust without inquiring whether the transaction was beneficial or not. The other case of *Ex parte Lacey* (1), cited by the Vice-Chancellor is also in point. It is unnecessary to consider whether the doctrine is applicable to a case in which several executors compromise a debt due from one of them, or how far such a compromise if beneficial to the estate will be excused and upheld by the Court, inasmuch as the learned counsel for the Plaintiff was content to rest his case upon the ground that the compromise was not beneficial to the estate.

Their Lordships are of opinion that this view of the case is correct.

It has already been shewn that £6000 of the debt due at the time of the testator's death had, prior to the compromise, been extinguished by setting off the estimated amount of *Altamont's* legacy, and that a portion of the balance then payable was discharged by actual payment at the rate of 20*s.* in the pound. *Altamont* according to that transaction, was allowed in account £6000, the full amount of his legacy, subject to his liability to refund if his one-sixth of the estate should eventually turn out to be less than £6000.

He had, therefore, as the Vice-Chancellor properly remarked, "nothing further to receive from the estate, and the whole of the residue was trust property liable to be accounted for by himself and his co-executors." But when the compromise was entered into the settlement in account was ignored and abandoned. The debt due to the estate, upon which 5*s.* in the pound was to be accepted, was treated as amounting to £19,808. 17*s.* 10*d.*, in respect of which acceptances for the composition of 5*s.* in the

(1) 6 Ves. 625.

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pound amounting to £4952 and a fraction were given by the Defendant *Altamont;* two of such acceptances, for sums amounting together to £2476 and a fraction, were at ninety days, and the other for £2476 and a fraction at six months date.

Thus the debt of £6000 which, in effect, had been discharged by the settlement at the rate of 20*s.* in the pound was revived, and a composition of 5*s.* in the pound accepted in respect of it, payable by bills half at three months and half at six months date; and, further, *Altamont's* right to the legacy of one-sixth of the estate which had been satisfied in settlement of account was revived, and from the time at which the compromise was entered into the Defendants have divided the net assets of the estate into equal sixth parts and taken credit in their account with the estate for one of those parts, amounting to £1817. 14*s.* 1*d.*, and interest thereon amounting to £300, the two sums amounting together to £2117, as due to *Altamont* on account of his legacy, and for payments made to him on that account, instead of charging him with the amount which he was liable to refund in consequence of the amount of assets actually received having fallen short of the amount at which they were estimated at the time when the settlement in account was concluded. There can be no doubt that the compromise and the mode in which it was carried out was highly beneficial to *Altamont* and injurious to the estate and to the Plaintiff.

But, further, as regards *Altamont,* there was actual fraud in the transaction, for he admits that at the time when the compromise was entered into there was an understanding with the bank that if he should be in a position he was to make them further payments, but he adds, "I was not to be legally responsible." The understanding with the bank does not appear to have been made known to the other creditors who signed, nor does the fact appear to have been communicated even to his co-executors, and certainly not to the Plaintiff. The stipulation that he was not to be legally responsible did not render the secret understanding the less fraudulent, for it could not have been enforced even if the stipulation had not been made. The understanding was, however, acted upon, for it is proved that *Altamont* afterwards paid £2300 to the bank in addition to the composition of 5*s.* in the pound.

Altamont, on his cross-examination, said, "Notwithstanding the compromise, I have paid *Alberga Bros.* since the full amount of their debt. I have also paid the *Colonial Bank* about £2500 in addition. I think there was a small sum due in cash to *Charles Levy & Co.*, not included in the compromise, that was paid in full. The debt included in the compromise was between £3000 and £4000. I have paid *Leon* since £1000. I have paid *H. De Cordova & Co.* some £600 or £800 more by allowing them half commissions. The small debts were not included in the compromise and were paid in full. The transactions with the creditors were kept as secret as the compromise. *Alberga's* was an accommodation, and I repaid him by payments from time to time. They are the same *Albergas* that I have lent money to out of the estate."

It is unnecessary to say, although there are strong grounds for inferring, that all the additional payments were made in consequence of secret understandings with the creditors respectively prior to their signing the compromise. The understanding, as it is called, with the bank, was sufficient to vitiate the compromise.

The Defendant *De Mercado* in his evidence said, "By the statement of his (meaning *Altamont's*) affairs made up to 31st December, 1867, which he shewed to his creditors, I discovered that if I had pressed in the previous August bankruptcy must have been the result. In January, 1868, I accepted a compromise with him. If I had not compromised, the creditors would have thrown the estate into bankruptcy, and I believe they would not have got half the money that was offered. I took legal advice as to my power to compromise with him. I satisfied myself that, in accepting the compromise, I was acting for the best interest of the estate. I accepted the same compromise for my commercial debt of £3700. There was a cash debt of about £500 which I refused to compromise, as I thought he was bound in honour to pay me that. I was afterwards paid that £500 in full. That was cash lent to be returned when I wanted it. It was repaid between 1868 and 1869 by small payments of £50."

Notwithstanding all the above-mentioned payments to others, the Plaintiff was never informed of them, and nothing in addition to the 5*s.* in the pound was ever paid in respect of the debt due to the testator's estate. So far from it, *Altamont*, in his letter to the

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Plaintiff of the 18th of April, 1870, says, "If I were worth £1,000,000 the executors could never compel me to pay one shilling, because they, *in common with my other creditors*, gave me a discharge on my paying 5*s.* in the pound."

The large payments which were subsequently made to other creditors, in excess of the 5*s.* in the pound which they had openly and ostensibly agreed to accept, have a very strong bearing upon the question whether the composition was beneficial to the estate of which the Defendants were executors, and whether, if the composition had not been accepted, the payment of a larger amount might not have been enforced against the estate of *Altamont*, even if the creditors had thrown his estate into bankruptcy, as the Defendant *De Mercado* says they would have done.

In addition to the circumstance that the Plaintiff was never informed of the secret understanding with the Bank, and of the fact that many of the creditors were actually paid more than the amount agreed upon by the compromise, he was all along kept in ignorance of the settlement in account, by which *Altamont's* legacy of one-sixth of the estate had been extinguished and discharged, and of the fact that, upon the compromise, that settlement had been abandoned, and *Altamont* let in to share with the other legatees in the assets of the estate, and freed from his obligation to refund.

It is impossible to hold that the Plaintiff could under the above circumstances be bound by any assent to, or acquiescence in, the compromise, if he ever did assent to or acquiesce in the same. The Plaintiff, after he had been informed of the compromise by the letters of the 21st of January, 1868, from the executors and from his brother respectively, did say, in his letter of the 12th of February, "I must submit cheerfully to the reduction of my income;" but it is very doubtful whether that assent did not merely refer to the reduction in the allowance of from £20 to £10 a month mentioned in the letters of the 21st of January, 1878, without entering into the consideration of the particular circumstances under which that reduction had become necessary. The statements in the letters from the executors were little calculated to prepare the Plaintiff for the announcement in the letter of the 26th of February, 1870, by which he was informed that his stipend must altogether cease after the 31st of December then next, as

he was then indebted to his father's estate in the sum of £965 odd.

It is unnecessary to pursue this part of the case further, as their Lordships concur with the learned Vice-Chancellor in holding that the composition was null and void as against the Plaintiff, and that he is not bound by any assent to or acquiescence in the same.

This brings their Lordships to consider whether any and what variations ought to be made in the decree under appeal.

The decree declares that the executors are all severally liable to the estate as between themselves and the Plaintiff for the full amount proposed or intended to be abandoned by the compromise and given up by them to *Altamont*, with interest. The compromise being void as against the Plaintiff, there can be no doubt that that portion of the decree ought not to be varied so far as it relates to *Altamont*.

Their Lordships have had some doubts whether it ought to be varied as regards the Defendant *De Mercado*. In this respect the case of the Defendant *Julia De Cordova* is very different from that of the Defendant *De Mercado*, who, when he, as one of the executors, agreed to the composition, stipulated for a private benefit to himself. Although their Lordships, looking to the payments made by *Altamont* to the bank and other creditors, are of opinion that a larger amount than 5*s*. in the pound could have been obtained if the Defendants had not agreed to accept the composition, they are not prepared to hold, that even with the utmost diligence, the full amount of 20*s*. in the pound could have been realized; and they therefore think that although the Defendants *Julia De Cordova* and *Isaac Henry De Mercado*, by reason of their having signed the composition and acted upon it, are liable to be charged for wilful neglect and default, it will be proper and equitable instead of charging them with the whole of the 15*s*. in the pound given up, to charge them only with what, but for their wilful neglect and default, they might have received of the debt due from *Altamont*. The amount should be the subject for further inquiry. As to other objections to the decree, their Lordships are of opinion that it was not necessary to direct an inquiry previously to charging the Defendants, *Julia De Cordova*

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and *Isaac Henry De Mercado*, with what, but for their wilful neglect and default, they might have received; and that as regards the account signed by the Plaintiff and acknowledged to be correct, and the delay in commencing the suit, the Defendants are not in a position to contend that the Plaintiff is thereby barred from obtaining the relief which he seeks, considering the ignorance of the real state of facts in which he was kept by them, to say nothing of the poverty to which he had been reduced, and his want of means either to obtain legal advice or to take legal proceedings.

As to the 5th reason for appeal stated in the Appellant's case. The decree does not declare that the return of the inventory at an undervalue was of itself a devastavit, but that the Defendants were guilty of a devastavit in returning the inventory at an undervalue and in subsequently compromising the debt. The compromise was a devastavit, whether the estate was undervalued in the inventory or not. In the inventory the debt of *Altamont* was valued at 50 per cent. of the amount; it was compromised for 25 per cent. It seems, however, to be premature to declare that the estate was undervalued in the inventory, and their Lordships are of opinion that the declaration to that effect in the decree should be omitted, so as to leave the whole question open before the Registrar.

As to the 6th ground of objection. The Defendants were directed to sell the real estate. If they allowed *Altamont* to hold the stores and buildings at less than a fair occupation rent, they are chargeable with what would have been a fair occupation rent. There is, therefore, no objection to the 7th of the accounts and inquiries by the decree directed to be taken by the Registrar, or to the order that the Defendants be charged in their accounts (for that is the meaning of the order) with what shall be found to be a fair occupation rent.

It was objected to the 9th head of accounts and inquiries in the decree that the Defendants ought not to have been charged with interest at 6 per cent. per annum, or at any higher rate than 4 per cent. per annum, on the amounts which upon inquiry it should appear ought to have been invested, and, further, that it was premature to fix the rate of interest. The case of *Robinson* v.

Robinson (1) was cited in support of the objection as to the rate of interest. Their Lordships are of opinion that that authority does not support the objection, and that it ought to be disallowed.

It was objected that the decree was erroneous in ordering that in taking the accounts no credit is to be allowed to the Defendants in respect of any moneys expended in or about the repairs of the house and premises in *Duke Street*, devised to the Defendant *Julia De Cordova* for life. It appears to their Lordships that, as the house and premises were given to the widow for life without impeachment of waste, there may be circumstances under which the executors might have been justified in expending money to prevent the destruction or depreciation of the property. The decree ought to be amended by omitting the direction that no credit ought to be allowed for repairs. It will then be a matter for inquiry by the Registrar in taking the accounts whether any charge for money expended on the buildings which may be brought in by the Defendants ought to be allowed or not, having regard to the circumstances under which the expenditure was made.

Lastly, it was contended that, even if the compromise was void, the question of costs ought to have been reserved, but their Lordships are of opinion that there is no foundation for that objection.

Upon the whole, their Lordships will humbly advise Her Majesty that the decree be varied by omitting that part of it by which it is ordered and decreed that the said *Altamont de Cordova, Julia de Cordova* and *Isaac Henry de Mercado* are severally liable and responsible to the estate of the said *Aaron de Cordova*, as between themselves and the Plaintiff, for the full amount proposed or intended to be abandoned and given up by them to the said *Altamont de Cordova* by the composition or alleged release of the 20th of January, 1868, in the pleadings mentioned, with interest; and that in lieu thereof it be ordered, declared, and decreed that the said *Altamont de Cordova* is liable and responsible to the estate of the said *Aaron de Cordova* for the full amount of what would have been due and payable by him if that release or composition had not been made, with interest thereon at the rate of 6 per cent. per annum on that amount, and that the Defendants, *Isaac Henry de Mercado* and *Julia de Cordova*, are severally and respectively liable and

(1) 1 De G. M. & G. 247.

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responsible for so much of the said amount as would or might at any time have come to the hands of the Defendants, as executors and executrix of the said *Aaron de Cordova*, or to the hands of some or one of them, but for the wrongful and wilful acts, neglect, or default of the said Defendants, *Isaac Henry de Mercado* and *Julia de Cordova* respectively, and that they are severally and respectively liable to interest at the rate of 6 per cent. per annum on the amounts, if any, to which they may severally be found to be liable. Further, that so much of the said decree as declares that the Defendants returned an inventory of their testator's personal estate at an undervalue, and also so much thereof as directs that, in taking the accounts of the Defendants with their testator's estate, no credit is to be allowed them for or in respect of any moneys expended in or about the house in *Duke Street*, devised to the Defendant *Julia de Cordova* for life, be reversed, and that the said decree, except so far as it is hereby ordered to be varied or reversed, be affirmed.

The decree has been affirmed upon the main point, viz., the invalidity of the composition, and it remains substantially undisturbed as regards the Appellant *Altamont*. Their Lordships are therefore of opinion that the Appellant *Altamont* ought to pay, and their Lordships order that he do pay, the costs of this appeal. As regards the other two Appellants, the decree has been varied in a material point. They, however, joined with *Altamont* in the appeal, and endeavoured to support the composition. Under these circumstances, their Lordships are of opinion that the Appellants, *Julia De Cordova* and *Isaac Henry de Mercado*, ought not to receive or pay any costs of this appeal. They will, therefore, respectively bear their own costs thereof.

Solicitors for Appellants : *Tamplin, Taylor, & Joseph.*
Solicitors for Respondent: *Valpy, Chaplin, & Peckham.*

[HOUSE OF LORDS.]

FRANCIS CHARLES FAIRLIE . . . . APPELLANT; AND CHARLES BOOSEY AND JOHN BOOSEY . RESPONDENTS.

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June 23, 24, 26; *July* 28.

Music—Opera in Score—Arrangement for Piano—Registration—Copyright—Publication—5 & 6 Vict. c. 45—*7 Vict. c.* 12.

An infringement of the registered copyright of the music of an opera may be committed where the opera itself has not been published, and so no copy of it could be deposited, and where that music having been made the subject of two piano "arrangements," one without the voice, another for the voice, and, those arrangements having been published, the infringer has used them for his own production.

In such a case the question of what was intended to be registered will be considered with reference to all the parts of the register, and if certain portions of the forms of registry are, in the particular case, unnecessary and unmeaning, the introduction of them will not affect those portions of the register which are correct.

Offenbach composed, in *Paris*, the music of an opera called "*Vert-Vert*." *S.*, by his permission, made two "arrangements" of the music, one for the piano without, the other for the piano with, the voice. The opera was produced at the *Opera Comique*, in *Paris*, on the 10th of March, 1869, but was never, as a whole, printed. The two arrangements were printed in a book published in *Paris*, at 10, *Rue de la Chaussée d'Antin*, on the 28th of March, 1869. *B.* became the assignee of the music of the opera, and also of the "arrangements." He sought to register them in *England*. He filled up the statutory forms required for that purpose. One column of those forms had, in the lower portion, the heading, "Time and place of first representation," and the words, "*Théâtre Impérial de l'Opera Comique, Paris, France*, 10th March, 1867," but the upper portion of the same column had the words, "Time and place of first publication," under which were the figures and words, "28th March, 1869. 10, *Rue de la Chaussée d'Antin, Paris, France.*" The form relating to the assignment of the music of the opera was correct in the first two columns, but in the third, under the heading, "Assignee of copyright," were, first of all, the name and residence of *B.*, and then the words, "as assignee of the copyright in the music of the *said book*, and also of the right of publicly performing such music." The written but unpublished music of the opera was not deposited at *Stationers' Hall:* the "book" containing the pianoforte arrangements was deposited there. *F.* produced a dramatic representation calling it "*Vert-Vert*,

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music by *Offenbach*," the music being taken from the "arrangements," but the words were supplied by English writers:—

Held, that there had been a sufficient registration of the music of the opera, that this registration was not affected by the reference to the "book" of the arrangements, and that *F.* had been guilty of an infringement of *B.'s* rights.

APPEAL against a decision of the Court of Appeal, which had reversed a judgment of Vice-Chancellor *Bacon* in an action in which the Respondents had been Plaintiffs and the Appellant Defendant. The Respondents were music-sellers in *Regent Street*, and the Appellant was the manager of the *St. James's Theatre*. In the year 1869 *Jacques Offenbach* had composed a comic opera, to which he gave the name of "*Vert-Vert*," and on the 10th of March in that year it was produced at the *Opera Comique*, at *Paris*. An arrangement of the music of the opera had been prepared for the piano alone, by *L. Soumis*, and another arrangement, for the piano and voice, had been prepared by the same *L. Soumis*, and these were printed and published in a book for sale, on the 28th of March, at the *Rue de la Chaussée d'Antin*, at *Paris*. Messrs. *Boosey* claimed to have become the assignees of the opera from *Offenbach*, and sought to register it within the *Copyright Act* (5 & 6 Vict. c. 45), and the *International Copyright Act* (7 Vict. c. 12). The entries at *Stationers' Hall* were in the following forms:—

Time of making the entry.	Title of book.	Name and place of abode of the author or composer.	Name and place of abode of the proprietor of the copyright.	Time of place of first publication.
June 9, 1869.	*Vert-Vert, Opera Comique en trois actes, paroles de MM. H. Meilhac et Nuitter, musique de J. Offenbach.*	*Jacques Offenbach*, 11 *Rue Lafitte, Paris, France.*	*Jacques Offenbach*, 11 *Rue Lafitte, Paris, France*, Proprietor of the copyright in the music, and of the right of publicly performing such music.	28th March, 1869. 10 *Rue de la Chaussée d'Antin, Paris, France.* Time and place of first representation:— *Théâtre Imperial de l'Opera Comique, Paris, France*, 10 March, 1869.

Date of entry.	Title of book.	Assigner of the copyright.	Assignee of copyright.
June 9, 1869.	*Vert-Vert, Opera Comique, en trois actes, paroles de MM. H. Meilhac et Nuitter, musique de J. Offenbach.* See foreign entries, page 115.	*Jacques Offenbach*, 11 *Rue Lafitte, Paris, France*, proprietor of the copyright in the music, and of the right of publicly performing such music.	*Charles Boosey* and *John Boosey* of 28 *Holles Street, Middlesex*, as assignees of the copyright in the music of the said book, and also of the sole right of publicly performing such music.

The Plaintiffs discovered that the Defendant had produced, as a dramatic representation at his theatre, the music of the opera, and, as they alleged, "a translation of the said opera." A correspondence ensued between them, and the Defendant insisted on his right to continue the representation, and denied that he was in any way infringing any right possessed by the Plaintiffs. They therefore took proceedings in the Chancery Division, and applied for an injunction.

The defence was, that the Defendant had no reason to believe that there was any copyright in the opera, and he therefore employed Messrs. *Mansell* and *Herman* to write the libretto, or words, and they, with the assistance of the director of the theatre, arranged the music for the libretto; that his music consisted only to a small extent of the music of the opera; that he had taken that from *Soumis'* arrangement, adapting it to different words, and he insisted that, "although the music of the opera might, on the 9th of June, 1869, have been duly registered, yet, in consequence of a proper printed copy of the said opera comique not having been duly delivered to the office of the *Stationers' Company*, as required by 7 & 8 Vict. c. 12, and by the Convention under the Act of 5 & 6 Vict. c. 45, neither *Offenbach* nor his assignee was entitled to any copyright in *England*."

It appeared that the full score of the opera had never been printed—certain portions of it had been—but the opera as a whole remained in MS. The arrangements by *Soumis* had been printed, and a copy of the book containing those arrangements had been

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deposited with the *Stationers' Company* (1). It was therefore contended that there had been no complete registration of the opera, and that the only registration which had taken place was that of the arrangements by *Soumis*, which had not been truly described as a book of "music by *Offenbach*," and so had not been the subject of infringement.

The cause was heard before Vice-Chancellor *Bacon*, who was of opinion that the registration was a registration of the arrangement by *Soumis*, that the registration was defective under the 7 Vict. c. 12, in not mentioning the name of *Soumis* as the author of the pianoforte arrangement from which alone *Fairlie* had taken the music, and so dismissed the action. On appeal this decision was reversed on the ground that what was intended to be registered was the opera by *Offenbach*, that the entries were properly made, and that the reference by a date to the publication by *Soumis* and the deposit of the book containing that arrangement, and the omission to deposit the score of the opera which was only in MS., did not invalidate the registration; and finally, that the dramatic representation of the music of a substantial part of the opera, though taken from the arrangement, was an infringement of the sole right of performing the music, which had been assigned to the Messrs. *Boosey* (2). The appeal was against that decision.

Mr. *Benjamin*, Q.C., and Mr. *Romer* (Mr. *Robert Williams* was with them), for the Appellant:—

There is no title in the Respondents to sustain this claim. The right to protection under the *Copyright Acts* depends on the exact observance of the provisions of those Acts. Here there has not been an observance of them. The Respondents have not registered the opera which they now claim as property, and the Appellant has not taken anything from what they have pretended to register. They claim to have registered *Offenbach's* music—

(1) The title page of the book containing the arrangement was in the following words: "*Théâtre Impérial de l'Opera Comique.—A Mons. Victor Capoul.—Vert-Vert, opera comique en 3 Actes.—Paroles de MM. Meilhac et Nuitter.—Musique de J. Offenbach. Partition pour Piano seul, arrangée par L. Soumis. Prix net 10f. Paris: E. Hen, Editeur, 10 Rue de la Chaussée d'Antin. Londres: Boosey & Co., &c. Déposé selon les traités internationaux.*"

(2) 7 Ch. D. 301.

that music has never been published—the Appellant has never seen it and has not taken anything from it—no copy of it has been deposited at *Stationers' Hall*. It has not therefore been registered, and consequently cannot be claimed as copyright. The Appellant has used in part, but only in part, the pianoforte arrangement of *Soumis*, but that has not been registered, so that no infringement can be asserted as to that, but if it had been, the words used by the Appellant were not those employed in *Soumis'* arrangement, but were supplied in the libretto with which Messrs. *Mansell & Herman* furnished him. He has taken nothing of the words and only a small portion of the music in the arrangement, combining it with music by other composers. This case exactly resembles that of *Wood* v. *Boosey* (1). There *Nicolai* composed an opera in full score at *Berlin*. After his death *Brissler* arranged the score of the whole opera for the pianoforte—in registering this arrangement in *England*, *Nicolai's* name was put on the register as that of the composer of the music. It was held in the Exchequer Chamber that the full score of the original composition by *Nicolai*, and the arrangement by *Brissler*, were two entirely different things, that the latter was an independent musical composition of which *Brissler* was the composer, and that the entry was therefore invalid and gave no protection to the assignee of the registered composition. They who seek the protection of the Copyright Acts must exactly comply with the directions contained in those Acts, for copyright exists only by statute: *Reade* v. *Conquest* (2). In *Page* v. *Wisden* (3); *Low* v. *Routledge* (4); and *Boucicault* v. *Chatterton* (5), the necessity of strict correctness even as to the dates of publication was insisted on. And the case of *Reade* v. *Conquest* also established that two productions, though both of them the works of the same author, and in many respects exactly resembling each other, were still to be treated as different works, and a protection which might exist as to one would not be applicable to the other. Here the work registered was not that of *Offenbach* but of *Soumis*. The Respondents have not registered

(1) Law Rep. 3 Q. B. 223.
(2) 9 C. B. (N.S.) 755; 30 L. J. (C.P.) 209.
(3) 17 W. R. 483.
(4) 33 L. J. (Ch.) 717; Law Rep. 1 Ch. Ap. 42; Law Rep. 3 H. L. 100.
(5) 5 Ch. D. 267.

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Offenbach's music but a printed book, the date of the publication of which they have given as that of the 28th of March, and they have described themselves as the assignees of the "book," and have so entitled themselves, at the utmost, only to be protected against the publication and sale of that printed book. If it was intended to register *Offenbach's* music in the score, the copy of that score should have been deposited. It had not been so deposited. The sheets containing the original music were something entirely distinct from the arrangement of the book, a copy of which had been deposited. But even the registration of the book was itself defective and invalid, and gave no title to maintain an action of this kind.

Then it is submitted that what has been done here by the Appellant is, in itself, perfectly lawful under the provisions of the 15 & 16 Vict. c. 12, s. 6, by which a fair "imitation or adaptation to the English stage" of a foreign dramatic piece is permitted. Here a part only of the pianoforte arrangement was taken, the words of the arrangement were not taken, but others were supplied by two English writers, a completely new and different libretto was made, and there was nothing in what was produced by the Appellant but what was in reality a fair adaptation presented to the public.

In *Reade* v. *Conquest* (1), it was settled that a novel written by one person might be dramatised by another without the latter being guilty of any infringement of copyright. *Toole* v. *Young* (2) followed the same rule, the principle being that the production of a drama, even though founded on ideas suggested by a novel previously published, was, in itself, a new and independent work. That was all that had been done here.

Mr. *Kay*, Q.C., and Mr. *Philbrick*, Q.C. (Mr. *T. A. Roberts* was with them) for the Respondents:—

The argument that the only thing registered is the book, is absolutely displaced by a reference to the entries. Throughout all of them the opera is referred to and the music of it is described to be by *Offenbach*—and he is described, too, as the person entitled, as the author of the music, to the copyright in it, and to the sole

(1) 9 C. B. (N.S.) 755; 30 L. J. (C.P.) 209. (2) Law Rep. 9 Q. B. 523.

7 Jur. N.S. 265

right of performing it. The date, too, of the first representation is also given. The entries, therefore, are so far perfectly correct. But then there is, no doubt, also an entry of a first publication as upon the 28th of March, which was in fact the date of the publication of *Soumis'* arrangement, and in another column, which gave the names of the Respondents as the assignees, there are the words, "of the copyright in the music of the *said* book." These expressions were inaccurate and unmeaning, for no book had been previously spoken of, and the word "book" had never been previously used. It was found only in the formal wording of one of the columns, as copied from the form given in the schedule to the statute, which column, it was known, was applicable to many other things besides books, and the form of which must be followed and would not be allowed to be altered. There was therefore nothing in that unmeaning expression which could affect the right of the Respondents. All the other parts of the entries being perfect, and pointing to the music of the opera alone, could not be invalidated by this inaccuracy. The whole of the entries must be taken together, and then there could be no doubt as to what they were intended to describe, namely, the music of the opera. Repeated as were the names of the opera and of the author of the music, every reader of the entries would refer them to the comic opera of "*Vert-Vert*," by *Offenbach*, and no one would be misled for a moment by the date of the "28th of March," or the words, "said book." The case was not at all like that of *Wood* v. *Boosey* (1), for there the main and substantive part of the description was erroneous, for the name of *Nicolai*, the composer of the original music, was given, when in fact the thing intended to be registered was, not his original music, but the arrangement made by a third person after *Nicolai* was dead. The entry was wrong in point of fact, and therefore could not be supported. Here it was right in point of fact, in all respects, but something unnecessary was added, and that unnecessary thing was now put forward as something which was to invalidate all the rest, though all the rest was perfectly clear, good, and in accordance with the statute.

The Appellant does not deny that he has taken *Offenbach's* music, he admits that when he says that he has taken the music

(1) Law Rep. 3 Q. B. 223.

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of the arrangement, which was avowedly an arrangement of *Offenbach's* music, made, too, by his authority. That was a clear infringement of the right of the author of the music. The second case of *Reade* v. *Conquest* (1) shewed that; there the same person produced a drama called "*Gold*," and then a novel called "*It is Never too Late to Mend*," founded upon his own drama, containing the same incidents and characters and much of the same language, and the Defendant, being at the time ignorant of the existence of the original drama, dramatised the novel, using, of course, the same incidents and characters and language, and that was held to be an infringement of the Plaintiff's copyright of the drama itself. The fact that there was no intention to infringe the Plaintiff's right was not in that case treated as an answer to the Plaintiff's claim. The labour of the Plaintiff was appropriated by the Defendant, though he did not know of the drama, but supposed that he was dramatising the novel—and, so here, though the Defendant, as he said, merely meant to use the arrangement, still, that being the music of *Offenbach* himself, though by his consent arranged by some other person, he was liable for the infringement —it was an unlawful use of the music of the opera.

Mr. *Benjamin* replied.

THE LORD CHANCELLOR (Earl *Cairns*):—

My Lords in this case there can be no doubt that the present Appellant is an infringer of a musical composition of which the Respondents claim to be the proprietors. That appears to be placed beyond controversy by the fact that the performance which he advertised was stated in the advertisement to be "music by *Offenbach*;" and farther by this, that his case, as stated by himself, is that he was under the belief that there was no existing copyright in this music in this country—that it was therefore public property, and might be publicly performed by him. The question of infringement, therefore, is established beyond the possibility of doubt.

My Lords, it is also, as it appears to me, perfectly clear that the Respondents, or those under whom they claim, intended to comply

(1) 11 C. B. (N.S.) 479; 31 L. J. (C.P.) 153. 8 Jur. N.S. 765.

with the provisions of the *Copyright Act*, and to make the entry which the Act of Parliament requires. If, therefore, they have not done so, it is from error of judgment, and not from any intention of not complying with the provisions of the Act of Parliament. The question, therefore, becomes simply the legal one: is the registration which is before your Lordships a compliance, or is it not, with the provisions of the Act of Parliament.

Now, on this subject, I have read with care the observations made by Lord Justice *Thesiger* in the Court of Appeal (1), and I have also had the advantage of perusing the observations which your Lordships will hear from my noble and learned friend, Lord *Blackburn*, and, having done that, it appears to me that I should be improperly occupying your Lordships' time if I were to go into a repetition of views with which I entirely agree, and with the expression of which I am perfectly satisfied. I will therefore leave my noble and learned friend to make the observations to which I have referred; and I will content myself with moving your Lordships that the judgment of the Court below be affirmed, and the appeal be dismissed with costs.

LORD HATHERLEY:—

My Lords, I have come to the same conclusion upon hearing the arguments at your Lordships' Bar, and I have also had the advantage of perusing the views of my noble and learned friend opposite (Lord *Blackburn*), which he has placed in print in this matter. The Plaintiffs in the Court below, and the Respondents in the case here, seek to have the benefit of the Act of Parliament, enacted in aid of authors of musical compositions, namely, the sole right of representation. Your Lordships are aware that as regards musical compositions there is a double right—a right to secure what is called the copyright of the book, which is the sole and exclusive right of multiplying copies; and also in respect to dramatic performances, a right to secure, under certain conditions specified in an Act of Parliament, to foreign composers, the sole right of representation in this country.

In the present case the question depends upon a treaty with

(1) 7 Ch. D. 311.

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France. The Act of Parliament authorizes the entering into treaties by which this right is to be secured to composers upon their fulfilling the requisite conditions. The application must shew that the performance had taken place abroad not more than three months before the registration here in *England.* The registration here in *England* is required to be of a certain character, upon which, in fact, the whole argument has turned, and the argument is reduced to this narrow point. I will not go into the details of it, because I think that they have been more thoroughly worked out by my noble and learned friend, who will presently address your Lordships. But the point is this—whether or not that which was registered in this case was a sufficient compliance with the Act of Parliament, which requires several special things to be specified on registry. When I read the headings of the entries, it will appear manifestly by those headings what the provisions of the Act of Parliament are, because they are made to adapt and to fit themselves to the provisions of the Act. The headings under which registration has to be made are:—[His Lordship read them, see *ante*, pp. 712, 713.]

On the 9th of June, 1869, as it is stated in the case, in alleged pursuance of the provisions of this Act, and with a view of obtaining the benefit of the Act and the convention founded upon it, a copy of the book containing the arrangement was delivered to the officer of the Company of Stationers, and the requisite entry was made in the book of registry kept at *Stationers' Hall.* Then what came to be registered was, in effect, a pianoforte adaptation in this particular book, which was deposited, of *Offenbach's* music; and although I do not think that it affects the question at all one way or the other, it is stated in another part of the case that the whole opera was composed by *Offenbach*, and was represented by him in *France.* But the question here is whether this particular thing, which turns out to be simply an accompaniment for the pianoforte, was or was not such a registration of the work within the meaning of the Act as to entitle the person, so registering it, to say that no other person was to have the performance of that work which he had so composed.

In this case I should have preferred having a more complete state of evidence in the matter, but, unfortunately, we are left

wholly without any information from experts as to what may or may not be called the "work" or the "book" in speaking of a musical composition. I think, however, that it will be shewn in my noble and learned friend's views that the Courts in this country have hitherto considered that any work or printed book which conveys the melodies of the opera to the public mind, and which does, in effect, give the full substance and gist of the composition, may be treated as a registration of *the* book.

Now as far as we can understand from the somewhat imperfect state of the evidence, and as far as it can be shewn by other cases which have been decided on the same subject-matter as this, the melodies are to be found in this pianoforte arrangement which was registered. It is said that there was some mistake in making this registration—that some other work was intended to be registered, and that this was registered instead; but I apprehend that if it be found that in all other respects the requisites for registration are complied with—that the limitation of three months which was given by treaty within which the work was to be registered, has been fully and adequately observed on the part of *Offenbach*—then from what has been previously decided, and notably, I think, in the case of *Wood* v. *Boosey* (1), where the matter was discussed, what has been done has given him so far a proprietorship in his undoubted work; because as to his being the original composer there is no question raised, except (a point which I shall not enter into in detail) as to the extent to which the pianoforte arrangement can claim to be considered a separate and distinct work. That *Offenbach* is the author and proprietor of this book is sufficiently clear on the evidence. In another case, that of the composer *Auber* (2), it was decided that the marrow and pith and substance of the work itself was sufficient to entitle him to have the unqualified and sole right of representation and of multiplying copies, which is all that is insisted on in this suit. All we have to look to is to see whether he has established such a right as entitles him to the sole right of representation.

It appears to me, my Lords, looking to the whole of the entry, and to previous decisions, that we should not be authorized in saying that he has not done so. Therefore the decision which was

(1) Law Rep. 3 Q. B. 223. (2) *D'Almaine* v. *Boosey*, 1 Y. & C. Ex. 288.

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come to in the Court below was right, and the appeal must be dismissed.

LORD O'HAGAN:—

My Lords, in this case I am of opinion that the judgment of the Court of Appeal should be affirmed.

The Respondents claim, as assignees of the interest of *Jacques Offenbach* in the copyright of the music of the opera of "*Vert-Vert*," the exclusive privilege of publicly performing such music; and the question substantially is, whether *Offenbach*, when he made his assignment to them, had effectually fulfilled the conditions prescribed by 7 & 8 Vict. c. 12, as necessary to vest in him a monopoly of the right to perform, in *England*, the music of which he was, confessedly, the author?

The contention of the Appellant was that the registration relied on regarded not the music of *Offenbach* and his right to perform it, but an arrangement of it for the piano by *Soumis;* and the Vice-Chancellor yielded to that contention, declaring that *Offenbach* had registered a publication "which is quite different from his own original manuscript," and that, therefore, "no copyright was acquired," nor any exclusive privilege of representation.

On the other hand, the Court of Appeal, unanimously reversing the Vice-Chancellor's judgment, has held that the terms of the registration were designed to be, and are, protective not of the arrangement by *Soumis*, but of the opera of *Offenbach*, and his right to represent. Forming the best judgment within my power, I think, notwithstanding some difficulty which unquestionably arises from the form of the entries and the lodgment of the book to which reference is made, that they point, with sufficient clearness, to the music of the composer as the subject of the registration and the thing to be protected by it.

The judgment of the Court of Appeal, delivered by Lord Justice *Thesiger*, is so exhaustive of the case that I can add nothing material to it, either as to the construction of the statute, or as to the effect of the entries in the registry at *Stationers' Hall.*

In the music of the opera of *Offenbach*, and the arrangement for the piano by *Soumis*, there may be two separate properties which may be vested in two several persons by separate registrations.

Offenbach may have the first, with the sole right of representation, whilst the second may belong in *Soumis*. The short question seems to me to be, to which of them the entries are reasonably and fitly applicable? If to the arrangement, the appeal should be allowed. If to the music of the opera, we should affirm the judgment.

In the second column of the entry in the books of registry we have the title of the opera, which is described as "*Vert-Vert*," a comic opera in three acts, the words by *MM. Meilhac* and and *Nuitter*, "*Musique de J. Offenbach.*" We have nothing to do with the words of the opera, or their authors; the material part of the entry affects the music only. Then in the second column, we have the name of "the author and composer." Of what? Manifestly of the music referred to in the first, and not of any "arrangement" of it, whether for the piano alone or for the piano and the voice. *Offenbach* is the composer seeking protection, and his music only is to be protected. The fourth column makes this, if possible, still plainer, giving the name, &c., of the proprietor of the copyright. His name is *Offenbach*, and he is described as "proprietor of the copyright in the music, and of the right of publicly performing such music." What was *the* music of the copyright of which and the right of performing it, he is proprietor? Surely, the "*Musique de J. Offenbach*" described in the second column, of which, in the third, he is named as the author and composer, and nothing else. The property is in the music, and not in any arrangement of the music. The proprietor is the man who composed the music, and not the man who afterwards made the arrangement. To the latter, so far, there is absolutely no reference. Of his existence or the existence of his work we have no information. *Offenbach* is the composer who seeks to have his copyright secured; and the copyright is of his music, which he claims to have the exclusive right of performing. *Soumis* is not mentioned. The arrangement of *Soumis* is not named. If there had been nothing more in the entry, it would be impossible to suggest that it was meant to affect any one but *Offenbach*,—any music but that composed by him.

Then comes the fourth column, on which alone such question as exists here has been raised by the Appellant. When the entries

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were made, a book (since produced to your Lordships) containing *Soumis'* arrangement for the piano, was delivered to the officers of the *Stationers' Company*. This book is the subject of one of two entries in the fourth column, under the heading "time and place of publication," and is stated to have appeared on the 28th of March, 1869. But the second entry in that column headed "time and place of first representation" gives for time the 10th of March, 1869, and for place "*Théâtre Impérial de l'Opera Comique, Paris*"; and there can be no controversy that the opera represented at that time and place was the opera of *Offenbach*. Now it cannot be disputed that, if the lower entry had stood alone, *Offenbach* would have fulfilled all the conditions of registration imposed by the statute, and would have had an unquestionable right to perform the music of his own opera exclusively in *England*. Taken with the entries in the preceding columns it would have constituted a full statement of his claim to perform that music, and his claim could not, in my opinion, have been denied. I concur with the Court of Appeal that the complete title, so established, cannot be vitiated because of an entry which was unnecessary, a lodgment of a book which was not required, and really was of no effect, and a statement which could not mislead as to the real purpose and object of the registration. The first entry in the fourth column could not, in my opinion, have reasonably led any one to think that the work to be registered was the arrangement by *Soumis*, in flat contradiction to all the other entries which pointed, as I have shewn, unmistakeably to the music of *Offenbach*, and it has not been possible successfully to argue that any valid registration of anything but that music could be accomplished by the entries taken altogether. In *Wood* v. *Boosey* (1), as has been properly remarked, the words "pianoforte score" were in the second column, whilst we have here "*Musique de J. Offenbach*"; and no such words, or any equivalent for them, anywhere qualify the effect of claiming for the composer the right to perform his own music, whatever use others might make of it by arrangement for piano or for voice.

No doubt the headings of the register create some confusion, as they speak of the publication of a book, and the only book delivered

(1) Law Rep. 3 Q. B. 223.

was that which contained *Soumis'* arrangement; but we must take all the entries together, and determine upon the whole what it was proposed to register, and what was actually registered. And so considering them, I find it impossible to hold that they were intended to point to the book produced to us, which is described as containing "*Partition pour piano seul, arrangée par L. Soumis.*" Those words appear upon the title page, but they were omitted in the second column of the entry, which contains the antecedent words "*Opera Comique en 3 actes, paroles du MM. Meilhac et Nuitter, Musique de J. Offenbach.*" The omission of the latter part of the title page goes strongly to sustain the view that the arrangement which it designates was not contemplated as the subject of the registration, whilst the retention of the description, "*Musique de J. Offenbach,*" indicates sufficiently the nature and extent of that subject. The book may have been delivered as containing the music which had been arranged, but the needless delivery of it cannot, in my mind, derogate from the validity of the registration of that music and the right to perform it. The larger portion of it was, as I understand, comprised in the arrangement; and, in that way, the book delivered contained substantially the composition which it was intended to protect. It is described in the affidavit of the Appellant himself as "a printed copy of a piano-forte arrangement of the music of the said opera."

As to the question of infringement, there seems to be no doubt that a very important portion of the registered music was appropriated by the Appellant, in an opera comprising it, along with parts of the works of other composers; and in this way the right secured to *Offenbach* and his assignee by the registration was substantially violated. Two skilled witnesses having had the fullest opportunity of forming an accurate judgment, swear that "the greater part" of the music of the opera produced by the Appellant was that of *Offenbach's* opera of "*Vert-Vert.*" They specify in detail the pieces which had been transferred from the latter to the former; and no contradiction of this evidence is offered by any one—save that the conductor of the orchestra at the *St. James's Theatre*, who assisted in arranging the work produced by the Appellant, says that only one-third of the music which was appropriated was taken from *Offenbach's* opera, and not as he

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composed it, but adapted from the arrangement, and rearranged. This seems to me a full admission of a substantial infringement; and if it were held justifiable by reason of the adaptation, the security designed by the law for the authors of original music would be practically nullified.

I am therefore of opinion that there was, in this case, an effectual registration of *Offenbach's* exclusive right to represent this opera, and a clear infringement of that right, and that the appeal should be dismissed, and the judgment of the Court of Appeal affirmed with costs.

LORD BLACKBURN :—

My Lords, in this case *Jacques Offenbach*, a Frenchman, composed the music of an opera called "*Vert-Vert*," and on the 10th of March, 1869, caused it to be represented on the stage of *Paris*. The words of the opera, as represented, were by *Meilhac* and *Nuitter*, and to those words *Offenbach* has set up no claim; but the music was by *Offenbach*.

Offenbach had, under the *International Copyright Act* (7 & 8 Vict. c. 12) and the Order in Council applying that Act to *France*, the power of acquiring in this country, for himself or his assigns, two perfectly distinct rights. One was the monopoly, for a time, of the right of printing and multiplying copies of this music; the other was the monopoly, for a time, of performing the whole or any part of the musical composition, created in the case of British compositions, by the joint effect of 3 & 4 Will. 4, c. 15, and 5 & 6 Vict. c. 45, ss. 20, 21. It is the latter of those rights only which comes in question in this cause. Both however were subject to the condition that within the period prescribed by the Order in Council (in case of *France* three months) he should comply with the conditions contained in the 6th section of the 7 & 8 Vict. c. 12. If these are not complied with, the composer of a work first represented abroad, has no right in this country. If they are, he and his assigns have exactly the same rights as the composer of a work first represented in the British dominions and his assigns have, under the Act 5 & 6 Vict. c. 45.

I may observe that as far as regards the inchoate right of the composer to have a monopoly of the representation of his music,

it is not material whether he has, or has not, printed for sale the whole or any part of his music. He may acquire this right, though he has printed for sale every note of his music. He may acquire it though he has never printed a single note. But the conditions to be fulfilled in order to perfect his right are not the same in the two cases. In the present case *Offenbach* has not exactly done either of those things. The score of the opera has never been published at all; but on the 28th of March, 1869, he published, or at least allowed to be published, in *Paris*, what on the title page is called the opera of "*Vert-Vert*," words by *Meilhac* and *Nuitter*, music by *J. Offenbach*, "*Partition pour Piano seul, arrangée par L. Soumis.*" This being arranged for the piano alone, had no words printed on it. He also published, or at least allowed to be published, at some time before the entry on the register, what is called, as before, the opera of "*Vert-Vert*," words by *Meilhac* and *Nuitter*, music by *J. Offenbach*, "*Partition Chant et Piano, arrangée par L. Soumis.*" This being arranged for the voice as well as the piano had the words printed as well as the music.

No evidence of experts was given as to how much of the original opera these two arrangements contained. The two books were put in evidence, and produced at your Lordships' Bar. As far as I am personally concerned, I cannot read a note of the composition, and have no knowledge of music.

I must, however, when any question comes to me to be decided by me requiring some knowledge of music, acquire the necessary knowledge. In *Wood* v. *Boosey* (1), the Court of Queen's Bench, of which I was then a member, had to decide a question requiring some knowledge of what an arrangement for the piano by one, of an opera composed by another, was. I, with diffidence, formed my opinion on the evidence, and expressed it. The case was appealed, and came on before, amongst others, Lord Justice *Bramwell*, then Baron *Bramwell*, who is one of the few Judges who possesses a scientific knowledge of music, and is qualified to give evidence as an expert. He explained the matter in a judgment reported in the Law Reports (2); and I am of opinion that the knowledge to be derived from what was proved in that case, and from the

(1) Law Rep. 2 Q. B. 340. (2) Law Rep. 3 Q. B. at p. 231.

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explanation of the matter there given by Baron *Bramwell*, is enough to enable me to decide the present case.

It is as well to state what really was the question in *Wood* v. *Boosey*, for the case seems to me to have been misunderstood. *Otto Nicolai* had composed an opera, and caused it to be performed at *Berlin* on the 9th day of March, 1849. His inchoate rights to a monopoly in this country were exactly the same as those of *Offenbach* in the present case. The time prescribed by the Order in Council with regard to *Prussia* is twelve months; that prescribed by the Order in Council with regard to *France* is three months: that was the only difference. *Otto Nicolai* died within the twelve months, and neither he nor his representatives did anything to render his rights in this country perfect before the end of the welve months; and consequently, by the 19th section of 7 & 8 Vict. c. 12, neither he nor his assigns could, after that, acquire in this country any rights as to the music first represented in *Berlin*.

But on the 1st of September, 1851, more than twelve months after *Nicolai's* death, his personal representatives published in *Berlin* the music of the opera arranged for the pianoforte, and on the 4th of October made an entry in the registry of the opera "Pianoforte score," stating the composer to be "*Otto Nicolai*." The action was for infringing the right to multiply copies of this pianoforte score. The Plaintiffs had to maintain two positions; first, that the pianoforte score contained an original composition, not published at *Berlin* till within twelve months before the 4th of October, 1851; and, secondly, that the composer of that original composition was *Nicolai*, who had been dead more than twelve months before the 4th of October, 1851, and had in March, 1849, represented at *Berlin* the whole opera as he composed it. It was certainly very difficult to maintain both positions, and unless he could maintain both the Plaintiff was rightly nonsuited. The nonsuit was upheld on the ground that, though he had made out his first position, he had failed in making out his second.

What I understand to have been proved in that case was, that in an opera the tunes and the harmonies and accompaniment are the composition of the original composer, in that case *Nicolai*, in this case *Offenbach;* but that to bring out these tunes and harmonies, and the effect as far as possible of the accompaniment on

any particular instrument or instruments, farther work is required. The person who prepares the original score for the performance on the stage by many instruments, and by the voices of many singers, writes down what notes are to be played on each of the instruments, and what notes are to be sung by the different voices. And by that means it is shewn what instruments or voices are to play or sing the tune, and what are to produce the harmony and play the accompaniment in a full orchestra and singers. But if the same tunes and harmonies are to be performed on the pianoforte, or sung by voices accompanied by the pianoforte alone, something more is required. It must be indicated what notes are to be played on the pianoforte so as to give the harmony and tune and effect—not precisely the accompaniment as it would be brought out by the full orchestra, for that, as I understood my Brother *Bramwell*, is impossible—but to give the harmony and tune as near to that effect as the arranger for the pianoforte can contrive. And that arrangement, though it adopts the harmony and tune, is an original composition, or at least a new work.

Now, in the present case, the arrangement for the piano published on the 28th of March did, according to this explanation, contain the whole of the tune and harmony performed in the theatre on the 10th of March; but did not contain all that was there performed, for *Offenbach* had in effect arranged that tune and harmony for a full orchestra and voices, and it also contained something else, for *Offenbach* had not arranged that tune and harmony for the piano, but *Soumis* had.

In the second arrangement for the voice and piano, all that was contained in the arrangement for the piano alone, and a little more, was contained; for that arrangement would indicate what notes were to be sung by each voice when joining in a duet or trio, and that would not be indicated on the piano score. And I will assume in favour of the Appellant that this indication of what notes were to be sung by each voice was identical with that contained in the original unpublished score of *Offenbach*.

My Lords, I do not think it necessary to decide whether the printing and publishing the harmony and tune was a printing and publishing of the musical composition. That, I think, is a question of degree. I take it that if an author of a drama does, in

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deference to what he considers the bad taste of the players and audience, leave out what he considers poetical gems, and in their place inserts what he is ashamed of as clap-trap, and allows his drama, thus altered, to be represented on the stage, and then prints his drama as originally written, without the clap-trap and with the poetry, it would be a question of fact and degree whether this drama as printed for perusal in the study, was such a printing of the dramatic composition as represented on the stage, as to oblige him (if wishing to take advantage of the 7 & 8 Vict. c. 12) to notice this printing, and to give a copy of it to the *British Museum*. In most cases it would be so, and it would always be prudent to act as if it were so. But if afterwards he printed and published a second edition, adding in a note the suppressed clap-traps, I take it to be clear that the printing of these clap-traps would not be a printing of the drama; it would be the printing of a small part of the dramatic composition as originally represented, but too little to make it a printing of the dramatic composition itself.

Now, in the present case, either the printing of the harmony and tune in the piano score was a printing of the musical composition of *Offenbach*, or it was not. I do not say which, but the printing of the small part of the score, the voice parts, which was contained in the arrangement for the voice and piano, and was not contained in the arrangement for the piano alone, could not in my opinion be a printing of the musical composition. It is far too small a part to have that effect.

My Lords, if I have correctly apprehended the nature of the two publications of the opera arranged for the piano alone, and the opera arranged for voice and piano, I think there is no difficulty in holding that the decision of the Court of Appeal was right.

The entry states that *Jacques Offenbach* was the composer, and that he was the proprietor of the copyright in the music, and of the right of publicly performing such music, which was first represented on the 10th of March, 1869. But it also stated that it was first published on the 28th of March, 1869. Perhaps it would have been more precisely accurate to have said, "The music of which opera, with an arrangement for the piano by another author,

and without the arrangements for the orchestra and voice composed by *Offenbach*, were then first printed." The Vice-Chancellor construed this entry as claiming the whole of what was first printed on the 28th of March, including, therefore, *Soumis'* arrangement, which *Offenbach* did not make. I agree entirely with the Court of Appeal that this is not the construction of the entry. I do not think it claimed the arrangement, and I also think that if it had erroneously claimed it, the bad entry alone would not have invalidated the good entry, which had distinctly stated that he was the composer of the opera, first represented on the 10th of March, 1869, and entitled to the sole right of publicly performing such music; which in fact he was.

But the statute 7 & 8 Vict. c. 12, requires that when a composition has been printed, the date and place of the first publication should be entered, and a copy of such musical composition shall be delivered at *Stationers' Hall*. If the printing of the arrangement of the opera for the piano, containing as it did much the most important of *Offenbach's* composition, but not the whole score, was a printing of the composition within the meaning of the statute, the provision has been complied with. If it does not amount to such a printing, the precaution of giving a copy to the officer at *Stationers' Hall* does, I think, no harm.

But it was argued that the printing of the arrangement for the voice and piano contained a little more of *Offenbach's* composition than the arrangement for the piano alone, and that a copy containing that additional matter should have been delivered. That depends, in my opinion, on the question whether this additional matter printed was so substantial a part of the composition that the printing of it amounted to a printing of the composition. I am of opinion that in no view of the case can it be so considered. I think, therefore, that *Offenbach* had, on the 9th of June, 1869, complied with the provisions of the 7 & 8 Vict. c. 12, and was owner of the sole right of performing the music in public, to the same extent that a person domiciled in *Britain*, and bringing out the composition in *England*, would have been. Such a person may assign his right, and his assignee may make an entry of the assignment, which, if properly made, relieves him from the necessity of proving the assignment. Here the Plaintiffs have proved

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by *Offenbach's* affidavit the assignment, and it is immaterial whether the entry of the assignment was properly made or not. I do not, however, see any defect in it. The fact that a substantial part of the musical composition was performed in public by the Defendant, is proved beyond all controversy.

It was argued that the statute 15 & 16 Vict. c. 12, which gives power, *inter alia*, to the author of a dramatic piece first performed abroad to obtain a right to prevent, for a limited period, the performance in this country of representations of translations of such pieces, contains this clause, sect. 6: "Nothing in this Act contained shall be so construed as to prevent fair imitations or adaptations to the English stage of any dramatic piece or musical composition published in any foreign country." The Respondents do not in any way rely on the 15 & 16 Vict. c. 12, and if they did, nothing that is proved here could amount to a fair adaptation to the English stage, of this opera. Indeed, I own myself unable to understand what those words mean as applied to a musical composition; though they have an intelligible meaning when applied to a dramatic composition first performed in a foreign tongue.

LORD GORDON:—

My Lords, I agree that the judgment appealed against should be affirmed. I, too, have had an opportunity of perusing and considering the remarks which have been made by my noble and learned friend, Lord *Blackburn*, and as I concur in the view he has taken, as well as in what has fallen from your Lordships, it is not necessary that I should add anything to what has been already said.

Judgment of the Court below affirmed; and appeal dismissed, with costs.

Lords' Journals, 28th July, 1879.

Solicitor for Appellant: *E. Johnson.*
Solicitor for Respondent: *R. G. Marsden.*

[HOUSE OF LORDS.]

CHARLES BOYNTON . . . . . APPELLANT;

AND

GEORGE H. BOYNTON AND OTHERS . . . RESPONDENTS.

H. L. (E.) 1879 July 8, 10, 11, 28.

Permission to prosecute a Suit—Revivor—Executor—Costs.

An order, under the modern practice, allowing an executor to continue the proceedings in an action instituted by his testator, which order has been obtained by him after a judgment in favour of his testator, and after notice of an appeal against that judgment, is equivalent to the old order for revivor, and subjects him to the same liabilities. He becomes in effect a substantive party to the suit, and is personally liable to costs.

APPEAL against a decision of the Court of Appeal, which had reversed a previous decision of Vice-Chancellor *Hall.*

The Appellant and Respondent were brothers, sons of Lady *Boynton.* At the time of the events which gave rise to the suit *Charles Boynton* resided with his wife in the house of his mother; *George H. Boynton,* resided in the same neighbourhood, with his wife, in a house called *Haisthorpe Lodge,* which was the property of Lady *Boynton,* situated at a small distance from her residence. It appeared that Lady *Boynton,* who was above eighty years of age, at different times made several wills. There seemed to have been a doubt how she would dispose of *Haisthorpe Lodge* and *Farm* On the 30th of March, 1871, Lady *Boynton* executed a deed of appointment, by which she disposed the *Haisthorpe Lodge* and *Farm* in favour of her son *George H. Boynton;* and the question in the cause was whether this deed had been obtained from her by undue influence exercised by him. Lady *Boynton,* after having promised so to give it to him, recalled her promise, and said that the deed had been obtained from her by his undue influence, and an action to determine this question was instituted by Lady *Boynton* herself on the 15th of June, 1871. A great many witnesses were examined on both sides, and in the end Vice-Chancellor *Hall,* on the 13th of November, 1876, declared that the Plaintiff's execution of the appointment of the 30th of March, 1871, had been obtained by undue influence and was void, and ordered the

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deed to be delivered up to be cancelled; and he also ordered that *G. H. Boynton* should pay the costs of all parties. Lady *Boynton* died on the 26th of June, 1877, having appointed *Charles Boynton* executor of her will, and also her residuary legatee. He proved the will in September, 1877. On the 6th of November, 1877, *G. H. Boynton* served notice of appeal on *Charles Boynton* as legal personal representative of Lady *Boynton;* and on the 19th of November, 1877, *Charles Boynton,* as such legal personal representative, with a view (as he alleged) to the hearing of the appeal, and after an application to him for that purpose, obtained an order authorizing him to continue the suit (the old form being that of an "order of revivor") "in like manner as the Plaintiff might have done if she had not died."

The Court of Appeal, on the 16th of April, 1878, after a full hearing of the case and evidence, reversed the decision of Vice-Chancellor *Hall,* dismissed the Plaintiff's bill, and ordered that *Charles Boynton* should pay the costs of the suit and the costs of the appeal of the Respondents, *G. H. Boynton* and his daughter (1). The question raised upon this matter was whether *Charles Boynton* was entitled to treat the suit as that of Lady *Boynton* which he had merely continued as her representative, and not on his own account, and to take these costs out of the estate of the deceased, or was liable to pay them out of his own property.

Mr. *W. Pearson,* Q.C., and Mr. *Everitt,* for the Appellant:—

The judgment of the Court below is erroneous on the question of undue influence, and cannot therefore be sustained (2).

The judgment was equally wrong in directing *Charles Boynton* to pay the costs. *Charles Boynton* was not the Plaintiff continuing the action on his own account. It had been commenced by Lady *Boynton*: it was her action, and at first *Charles Boynton* had been one of the Defendants. The original judgment was in her favour. *George Boynton* had appealed against it, and the Lords Justices had reversed it. That reversal affected her and her estate, and must be treated as if pronounced against her in her lifetime. In fact, she had died before then, but she had appointed *Charles*

(1) 9 Ch. D. 250.

(2) This question was most elaborately discussed, but does not require a report.

Boynton her executor, and he was but acting as her representative in continuing an action which she had commenced, and which, as long as she lived, she had continued to carry on. The very words of the permission to continue the suit shewed that it was her suit and that he was treated merely as a representative of the original Plaintiff. No personal responsibility could, therefore, be thrown upon him. The judgment of the Court of Appeal must be satisfied by the costs being paid out of her estate.

Mr. *Kay*, Q.C., and Mr. *Maclean*, for the Respondent, insisted that *Charles Boynton* had a real interest in the suit, and had adopted it as his own. He need not have obtained the order to continue, which was in substance the old revivor, but he chose to do so, and thereby took the litigation with all its consequences on himself. They referred to *Horlock* v. *Priestley* (1), *Cook* v. *Hathway* (2), and *Daniell's* Chancery Practice (3).

Mr. *Everitt* replied.

THE LORD CHANCELLOR (Earl *Cairns*), after elaborately reviewing the facts of the case, expressed his complete concurrence with the opinion of the Lords Justices that there was no ground whatever for charging *George Boynton* with having obtained the deed of the 30th of March, 1871, by undue influence, and on that point moved the affirmance of the judgment of the Court of Appeal. His Lordship then said:—

A second and subsidiary question was raised, whether the order of the Court of Appeal was right in fixing the Appellant, *Charles Boynton* with the costs, in place of ordering them to be paid out of the estate of Lady *Boynton*. I think the decree is right. *Charles Boynton* was originally made a Defendant in the suit in another character, and at that time Lady *Boynton* was Plaintiff. Lady *Boynton* obtained a decree from Vice-Chancellor *Hall*, ordering the deed to be cancelled and the costs to be paid to her. She died before the costs were paid, and possibly, but this is not clear, before the deed was cancelled. Notice of appeal was given. In

(1) 8 Sim. 621. (2) Law Rep. 8 Eq. 612.
(3) Pages 1244–1284.

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this state of things *Charles Boynton* obtained the order of the 19th of November, 1877, analogous to the old order to revive, and he was thereby ordered, as legal personal representative of Lady *Boynton*, to be at liberty to carry on and prosecute the suit against the other Defendants in like manner as Lady *Boynton* might have done if she had not died. This order virtually made him the Plaintiff, and in the title to the order of the Court of Appeal dated the 19th of June, 1878, he was ordered to be at liberty to carry on the suit as the Plaintiff might have done. He thus adopted the suit, and adopted it *ab initio*. Had he been successful on the appeal he would have retained the cancelled deed, and received the costs ordered to be paid to Lady *Boynton*, together with the costs of the appeal, and as he has failed, he must, according to the well-settled practice of the Court, submit to an order for payment of the costs personally.

LORD HATHERLEY and LORD BLACKBURN expressed their entire concurrence.

Judgment appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 28th July, 1879.

Solicitors for the Appellant: *Sharp & Ullithorne.*
Solicitors for the Respondent: *Johnsons, Upton, Budd, & Atkey.*

[HOUSE OF LORDS.]

GARRETT WALSH, EUGENE COSTELLO, AND OTHERS . . . . . } APPELLANTS;

AND

HENRY L. PEMBERTON AND SAMUEL MURRAY HUSSEY . . . . . } RESPONDENTS.

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July 28, 29.

Landlord and Tenant Act (Ireland) 1870—"*The Bright Clauses*"—*Landed Estates Court, Ireland—Parties to a Suit—Parties to an Appeal.*

Semble, that no appeal will lie to this House from the Landed Estates Court in *Ireland* upon any question of the amount offered for the purchase of an estate sold in that Court, or of the person who is the proposing purchaser.

The 33 & 34 Vict. c. 46, the *Landlord and Tenant Act (Ireland)* 1870, provides, ss. 46–47, that where an estate is to be sold in the Landed Estates Court, facilities shall be given to occupying tenants to become purchasers of their holdings.

P., the trustee of an estate with full powers of sale, became the petitioner for the sale of it in the Landed Estates Court. Many of the tenants desired to become purchasers of their holdings. Several meetings were held by the parties interested. *H.* offered £80,500 for the estate. Several of the tenants were not satisfied that his proposal contained arrangements sufficiently advantageous for them, and raised objections. Two persons, *L.* and *M.*, who appeared to act as representatives of the dissenting tenants, offered £81,000 (or £500 more) for the estate. Their arrangements as to the ultimate sales of the holdings to the tenants appeared to satisfy the tenants. Proceedings were had in the Court, in which *P.* and *H.* and *L.* and *M.* became formal parties. The tenants themselves were not parties to these proceedings. The Judge of the Landed Estates Court, after a full hearing, decided that the offer of *L.* and *M.* ought to be accepted. On appeal this decision was reversed, and the conveyance ordered to be executed to *H.* No appeal against that order was made by *L.* and *M.* Several of the tenants proposed to appeal against it in respect of matters relating to their own interests:—

Held, that it was not competent to them to sustain such appeal; that as *L.* and *M.*, who were parties to the proceedings below, had not appealed, those who had put themselves under the guidance of *L.* and *M.*, but who had not been parties to the proceedings below, could not now constitute themselves parties for the purpose of raising an issue which had never been raised in the Court below.

IN a proceeding on a petition for the sale of an estate in the Landed Estates Court in *Ireland*, Judge *Ormsby* had made an order directing the sale to two persons named *Lombard* and

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Murphy to be completed. On appeal this order has been discharged, and an order made that the sale of the estate should be made to Mr. *Hussey*. A petition of appeal (the only one) had been presented to this House by certain tenants on the estate, and the question now was whether the appeal was competent.

The facts of the case, many of which are now immaterial to be considered, are fully set forth in the report of the proceedings in the Court below (1). The following is a summary of those which relate to the present application for leave to appeal.

In March, 1876, Mr. *Pemberton*, a trustee for a sale, under a will giving him large discretionary powers and bequeathing the proceeds equally among thirteen beneficiaries, presented a petition to the Landed Estates Court for sale of the estate, which was subject to only one mortgage (for £15,730), and produced about £3000 a year. All the lands, except to the value of £150 a year, were in the occupation of tenants, 149 in number; and in September, 1877, the consolidated final notice was served on them, notifying that any tenant who wished to purchase his holding (2) should attend before the Examiner on the 2nd of November with a proposal, which, if accepted, would be duly considered in the settlement of the rental. On the 2nd of November fifty-seven tenants attended accordingly; and on the same day *Tyrrell* and *Stannell*, the solicitors having the carriage of the bnsiness, brought before the Examiner an agreement, dated the 8th of June, 1877, by which the trustee had contracted to sell the whole estate to *G.* for £65,000. Another solicitor attended and

(1) Ir. Law Rep. 1 Ch. D. 428, *nom.* "In the Matter of the Estate of *H. L. Pemberton*, Trustee for Sale under the will of *Henry Benjamin Harenc.*"

(2) By the 33 & 34 Vict. c. 46, "*The Landlord and Tenant Act* (*Ireland*) 1870," the Board of Works in *Ireland* is authorized, when estates are to be sold, to make advances to occupying tenants, to enable them to purchase their holdings.

By sect. 46 it is enacted that the Landed Estates Court, so far as is consistent with the interests of the persons interested in the estates, or the purchase-money thereof, shall afford, by the formation of lots for sale, or otherwise, all reasonable facilities to occupying tenants desirous of purchasing their holdings under the provisions of this Act, and for that purpose shall hear any application in that behalf made by the Board of Works in *Ireland*, or any such occupying tenant.

The 47th section relates to the manner of making these advances, and the way in which repayment is to be made.

These clauses were known as "the *Bright* clauses."

offered £75,000 on behalf of his client, who proposed to sell to each tenant his holding upon specified terms. On the 13th of November *Tyrrell* and *Stannell* received a written offer of £80,500 on behalf of another intending purchaser. On the 21st the whole matter was brought formally before the Landed Estates Court, when £80,500 were offered upon behalf of Mr. *Hussey*. The Judge, on the 21st of October, 1877, directed the Examiner "to settle the rental *in toto* to suit such of the tenants as desire to purchase their holdings, due regard being had on such settlement to the interests of the *cestuis que trust*." On the 12th of December the Examiner proceeded to settle the rental, making a separate lot of the holding of every tenant who offered about twenty-five years' purchase for it. In the result the trustee, with the concurrence of the mortgagees, and of the only eight of the beneficiaries who were of age and within reach, including the father of three who were infants, contracted by agreement, dated the 14th of February, 1878, to accept the offer made on the part of Mr. *Hussey* for £80,500, "subject to lay tithes," and if the Judge should refuse to sanction this, then to sell to Mr. *Hussey* out of Court for the same sum. The arrangements proposed to be made by Mr. *Hussey* with the tenants did not appear to have been entirely acceptable to them, and some difficulty arose on that account. On the 5th of April the trustee served notice of an application to the Judge to confirm the agreement of the 14th of February, and convey the estate to Mr. *Hussey* accordingly, or to dismiss the petition for sale in the Court. On the 10th a meeting was held in the neighbourhood of the lands, where it became manifest that the tenants did not think that their interests would be sufficiently considered if the sale should be made to Mr. *Hussey*. The trustee's motion to confirm was postponed in order to enable the tenants to file affidavits, and, none having been filed, it came before the Judge on the 4th of May, when counsel on behalf of two gentlemen, named *Lombard* and *Murphy*, who appeared to represent the interests of the general body of the tenants, offered £81,000 (or £500 more than Mr. *Hussey's* offer) for the estate. The proposal, as immediately reduced to writing and signed by *Lombard* and *Murphy*, did not contain the words "subject to lay tithes," but by it they declared that they "purchased for the protection of the tenants

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and to secure for them their respective holdings," which they thereby undertook to sell to them, on certain conditions to be fulfilled within settled periods. The proposal of Messrs. *Lombard* and *Murphy* expressly excluded from these privileges the tenants of five townlands, who were in a superior rank of life and had large interests (1), and by whom over £24,000 had been offered for their holdings. An opposition arose on that ground. The Judge having declined to accept the proposal in the form in which it was presented to him, another was at once written out and signed by *Lombard* and *Murphy*, simply offering to purchase for £81,000, and they prepared to make a large deposit by way of earnest. The lay tithes on the estate amounted to more than £1000 a year, and the words "subject to lay tithes" were subsequently interlined in both the proposals of *Lombard* and *Murphy* by their counsel, but without any farther signature. The Judge declined to adopt Mr. *Hussey's* offer, or (as great expense had been already incurred in deciding rights of way, etc.) to dismiss the petition, but made an order accepting the second proposal of *Lombard* and *Murphy*, "regard being had to their proposal of equal date, and to their undertaking therein as to dealing with certain of the tenants on the said lands." The trustee, petitioner for the sale, and Mr. *Hussey* appealed, and the Court of Appeal (reversing the decision below), determined that, inasmuch as the Petitioner was in the position of absolute owner of a practically unincumbered estate, and his proposed sale to Mr. *Hussey* had the sanction of, substantially, all the *cestuis que trust*, Mr. *Hussey's* offer should have been accepted by the Judge, or, at any rate, that the petition should have been allowed to be withdrawn, the withdrawal not being opposed by any one having an interest in the lands, except the tenants, who had only a right to intervene upon such a question so far as respected any costs incurred by them; that they had had ample opportunities of availing themselves of the "*Bright* clauses" of the *Land Act;* that the Judge should not have regarded the rival professions of intending purchasers as to the facilities they would severally give the tenants for purchasing their own holdings; that there was nothing

(1) See in relation to this matter the case of *Preston's Estate*, Ir. Law Rep. 1 Ch. D. 43.

in the language of sect. 46 of the *Land Act* to exclude tenants of large holdings, or of a superior rank of life, from the benefits it conferred; and that, while the strict right of the trustee was to have his petition dismissed, the Court would, under all the circumstances of the case, order a conveyance to be executed to Mr. *Hussey* in accordance with his offer.

Messrs. *Lombard* and *Murphy* did not appeal against this order. A considerable number of the tenants, thinking their own interests were not sufficiently consulted, petitioned to be allowed to appeal against it. An objection was raised that, as they had not been parties to the proceedings below on which the order was made, they had no *locus standi* as Appellants.

Mr. *Chitty*, Q.C., Mr. *Rigby*, and Mr. *Garth*, appeared in opposition to the right of the tenants to be heard as Appellants in this case, they not having been parties to the proceedings in the Court below.

Mr. *Hickson* (of the Irish Bar) appeared for Mr. *Hussey*.

Mr. *Herschell*, Q.C., Mr. *Blennerhasset*, and Mr. *O'Riordun* (both the latter of the Irish Bar) for the tenants. They contended that the order of the 21st of November, 1877, (by which it was referred to the Examiner to settle the rental or lots to facilitate such of the tenants as desired to purchase their holdings) not having been set aside, but being still in full force, the rights of the tenants had been recognised in the Landed Estates Court, and that, in virtue of such recognition, the tenants were now entitled to appear as Appellants against the final order of the Appeal Court, which did, in substance, disregard and defeat that order of the 21st of November, 1877, and that the rights of the tenants could not be affected by the fact that Messrs. *Lombard* and *Murphy* no longer claimed to appear as their representatives and to contend for their interests.

Mr. *Chitty* in reply.

THE LORD CHANCELLOR (Earl *Cairns*):—

My Lords, this is a petition which your Lordships have thought it right should be heard at the Bar in the first instance in order

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to determine the competency of the appeal. The petition does not, in any way, touch the merits of the case which was under consideration in the Courts in *Ireland*. The point, and the only point, which your Lordships have now to consider is, whether those who have presented this appeal are persons who can properly be heard as Appellants, having regard to the position which they fill, and the course which they took in the Court below. My Lords I say that more particularly, because I should be sorry if any countenance were given to the idea that upon such a subject as the question of what sum should be offered, or from what person, as the purchase-money for an estate to be sold in the Landed Estates Court, an appeal could in any case be brought before this House. I desire to offer no opinion upon that, one way or the other. Certainly no such an appeal ever has been brought; and when it is brought by any person who has the right to be heard, it will then be for your Lordships to consider whether such a subject is a proper subject for an appeal. But the question now is the position occupied by those who have presented this appeal.

My Lords, the only facts I need refer to for the purpose of presenting to your Lordships the views which I take upon that question are these. There was an estate which came to be sold in the Landed Estates Court in *Ireland*. It was to be sold upon the petition of the owner, that is to say, the person who was the trustee of the estate for certain *cestuis que trust*, with large powers of management and sale. I believe there were some small incumbrances to be paid out of the proceeds of the sale, but the estate was perfectly solvent, a large surplus coming to the persons beneficially entitled. The estate was let out to tenants to the number of above 100; and under those circumstances the Act of Parliament, passed in the year 1870 (33 & 34 Vict. c. 46) provides by the 46th section that, "The Landed Estates Court, shall on the sale of estates by said Court, so far as is consistent with the interests of the persons interested in the estates, or the purchase-money thereof, afford, by the formation of lots for sale or otherwise, all reasonable facilities for occupying tenants desirous of purchasing their holdings under the provisions of this Act, and for that purpose shall hear any application in that behalf made by the Board or any such occupying tenant."

Now the order was made for the sale of the estate in the usual way, and the notices were issued, according to the practice of the Court, to the occupying tenants, in the form which had been adopted long before this Act of 1870 was passed, calling upon them to take notice of the settling of the rental which would be made. But this notice to each tenant contained one other clause which has been adopted since the Act of 1870 was passed, informing each tenant who wished to purchase his holding, that he was to make a communication upon that subject to the Court: "And notice is also given that if any tenant on this estate is desirous of purchasing his holding thereon he should attend before the Examiner on Friday the 2nd day of November, 1877, with a proposal for the purchase of such holding containing an undertaking to pay for same, after which no proposal for the sub-division of a lot can be entertained." And ultimately, I think, a day in December was fixed as the last day for proposals by the tenants.

The result was that a very considerable number of the tenants proposed to purchase their holdings. Some tenants made no proposals. Of those who sent in proposals a schedule was made in the Court, distinguishing the offers of those tenants which were held to be not inadequate and those which were held to be wholly inadequate. A considerable number was held to be not inadequate, and a certain number was held to be wholly inadequate.

Now I think it better to assume, for the purpose of what I have to say, that if nothing else had occurred there would, no doubt, have been opportunities for the tenants to bring to the test of the judgment of the Court, whether their offers should be accepted; and possibly an opportunity might have been given even to those who had made no offer, afterwards to send in the offer which in the first place they had neglected to send.

But what took place was this: In April, 1878, a gentleman of the name of *Hussey* made an offer to the owner, the trustee for the sale of the estate, and the details of that offer are given in an affidavit, which is printed. I do not propose to read it at length, but the offer was for £80,500, and the affidavit goes on to say that Mr. *Hussey*, the person who made the offer, proposed to sell various parts of the estate to the occupying tenants—in fact, had agreed with many of the occupying tenants for the sale of parts of the

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estate—not of the whole, but only of certain parts to the occupying tenants.

Now, upon the 5th of April, 1878, a notice was given by the owner, in the Court, that he would move the Court that that offer should be accepted with a certain alternative, which I need only refer to, of dismissing the petition. It now appears that the tenants were allowed to intervene, upon the occasion of the discussion before the Judge of the Landed Estates Court, as to whether Mr. *Hussey's* offer was to be accepted or not.

I here again, think it better to assume that the tenants might, under the clause of the Act to which I refer, have adopted this argument. They might have said we have certain rights under the Act of Parliament, and we wish to protect those rights. We are not satisfied with the offer of Mr. *Hussey* being accepted, or with the benefits which he proposes in his offer to give to us. We therefore ask the Court not to accept that offer, but, on the contrary, to look at the offer we have sent in, and to receive offers from those of us who have not yet sent in offers; I will assume in favour of the tenants that they might have adopted that course. But the course which they did adopt was not that one. It appears that during the hearing of the proposals an offer was made by gentlemen of the names of *Lombard* and *Murphy* in the face of the Court, and reduced to writing, to purchase for a sum of £500 more than the sum Mr. *Hussey* had offered, and the arguments at the sittings before the Court, appear to have been turned into a discussion whether Mr. *Hussey's* previous offer should be accepted, or whether that fresh offer of Messrs. *Lombard* and *Murphy* should be accepted.

Now, what is stated by the learned Judge as to what passed before him upon that point is very remarkable, because it shews exactly the attitude the parties had assumed in the first proceedings before the Landed Estates Court. In the report of the case in *Ireland* (1) Judge *Ormsby* says, "In round numbers Messrs. *Lombard* and *Murphy* bound themselves to sell to the tenants to the extent of £2100 a year." They said that they were willing to sell to the tenants who had made certain offers, and would give other tenants the opportunity of making offers. They bound

(1) Ir. Law Rep. 1 Ch. D. at p. 247.

themselves, they said, and I assume they did bind themselves, though I should have thought it very doubtful, to sell to tenants to the extent of £2100 a year, and Mr. *Hussey* to the extent of £700 a year or thereabouts.

Now comes the statement of what the argument was before the Judge. "Mr. *Atkinson*," the counsel "for one of the tenants with whom Mr. *Hussey* had agreed, appeared to support his offer"—that is, *Hussey's* offer. "Mr. *O'Brien*, for Messrs. *Sandys*, objected to either offer being accepted." Messrs. *Sandys* were not willing that the sale should be made either to Mr. *Hussey* or Mr. *Murphy*. "Mr. *Johnson* appeared for twenty-two tenants, of whom two only had offered for their farms—they supported Mr. *Hussey's* offer. About six tenants only were unrepresented on the motion. There can be no doubt the proposal of Messrs. *Lombard* and *Murphy's* offer is more favourable to the tenants generally than Mr. *Hussey's*."

Therefore it is quite clear that even before the Judge before whom the case came in the first instance, it was not suggested by any person, except possibly by the Messrs. *Sandys*, who are not Appellants here, that anything should be done except to accept one of those two offers. None of those who now appear as tenants said, "Do not accept either the offer of Messrs. *Lombard* and *Murphy*, or the offer of Mr. *Hussey*, but let the case go on as it is going on in its regular course, and let us, the tenants, go forward to make the best terms we can with our offers, each for his own holding." That was not the case urged on behalf of the tenants. The majority of the tenants said: "Accept the offer of Messrs. *Lombard* and *Murphy*;" and the minority of the tenants said: "Accept the offer of Mr. *Hussey*;" and the Court decided in favour of the offer of Messrs. *Lombard* and *Murphy*.

Thereupon there was an appeal. The tenants did not appeal. I will assume there again, though I think it is assuming a good deal more than the tenants are absolutely entitled to, that the matter being still in the Landed Estates Court, the tenants might have given notice, saying: "We see that there is danger in either of these offers being accepted, and we appeal, not against the decision of the Court to accept the offer of Messrs. *Lombard* and *Murphy* in preference to the offer of Mr. *Hussey*, but we appeal to

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the Court of Appeal that neither may be accepted, but that on the other hand the matter may be relegated to the Judge to proceed with the settling of the rental and entertain the offers from the tenants."

But the tenants did nothing of the kind. The appeal, and the only appeal, was from the owner of the land, and from Mr. *Hussey*, who complained of the decision of the Judge of the Landed Estates Court in accepting the offer of Messrs. *Lombard* and *Murphy* in place of the offer of Mr. *Hussey*.

My Lords, thereupon the case came before the Court of Appeal in Chancery in *Ireland;* and the only issue raised, as I think your Lordships will see, was, which of those two offers should be accepted. No person had raised, if any person could raise, the other issue, whether neither offer should be accepted, and a different course taken for the selling of the estate. The case came on for argument before the Court of Appeal. I find, in the report of the case, the argument of the learned counsel who appeared for the tenants, who there seem not to have been divided in opinion but to have been unanimous; and it was an argument not that neither offer should be accepted, but that the offer of Messrs. *Lombard* and *Murphy* should be accepted by the Court of Appeal, as it had been accepted by the Court below.

The Judges of the Court of Appeal took a different view from that taken in the Landed Estates Court; they accepted the offer of Mr. *Hussey;* they reversed the decision of the Landed Estates Court, accepting the offer of Messrs. *Lombard* and *Murphy*, and they constituted Mr. *Hussey* the purchaser in place of Messrs. *Lombard* and *Murphy*. Thereupon the tenants who argued, in the Court of Appeal, not that neither offer should be accepted, but that the offer of Messrs. *Lombard & Murphy* should be maintained, present a petition to your Lordships for a purpose entirely different, namely, to rescind the order of the Court of Appeal and to take the case back to the Landed Estates Court in order to settle the rental and examine the proposals by them for the purchase of the estate.

My Lords, if Messrs. *Lombard* and *Murphy* were dissatisfied with the decision of the Court of Appeal, I will assume, and I only do it for the purpose of argument, that they might have come before

this House to complain of that order, and to have it set aside, and themselves rehabilitated in the position of purchasers, in which they had been placed by Judge *Ormsby* in the Landed Estates Court. But they do not appear here; we know nothing as to them; they are satisfied at being put out of the case, they no longer wish to appear as purchasers, and they are not before us.

My Lords, it appears to me that it is quite impossible that the tenants can be allowed to be Appellants under these circumstances. I regret what has happened: one sees exactly that what has occurred is this—the tenants, placing confidence in Messrs. *Lombard* and *Murphy*, have chosen—to use a common expression—to fight their battle through them. If Messrs. *Lombard* and *Murphy* had persevered, the tenants would have had the benefit of their promise, and, if Messrs. *Lombard* and *Murphy* were right, would have prevailed. But Messrs. *Lombard* and *Murphy* have withdrawn from the contest, and the tenants having reposed their confidence in them, cannot now, as it seems to me, come forward for the purpose of commencing here a litigation, and raising here an issue which they never raised in the Court below.

My Lords, that seems to me to be the whole case, and if your Lordships take that view, I apprehend you can do nothing but resolve, as I propose your Lordships should do, that this petition and appeal cannot be received as being incompetent, and that those who have presented the appeal must, in the usual way, pay the costs incurred.

LORD HATHERLEY:—

My Lords, my noble and learned friend on the woolsack has laid the case so clearly before you, that it is quite unnecessary for me to travel over the same ground as regards the facts of the case. The only reason why I make any observation at all is this, that I think it important that it should be thoroughly and completely understood that, in the resolution which we have been exhorted by my noble and learned friend to come to, no decision is asked on the part of your Lordships' House to the effect that the rights secured to tenants by the 46th section of the *Irish Land Act*, are in any way being dealt with. No question arises or can possibly arise, at this stage of the proceedings, as to what

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the extent and character of those rights may be. There are rights of some kind, but how they are to be asserted will have to be determined at any time when a controversy may arise. At the present moment we have literally no controversy of that kind before us.

We are asked to come to a decision upon an appeal from an order which is injurious, as the proposed Appellants conceive, to their interests: at the same time it is an order which they have had every opportunity of opposing, if they had thought fit to oppose it, or of supporting, if they had thought fit to support it; but they took no such step. There is nothing that they ask for that has been refused them—there is nothing that they opposed which has been granted, except so far as they opposed the confirmation of the order in which *Hussey* was approved of as the purchaser. That is not a case in which I apprehend these parties have any *locus standi* for the opposition that they wish to make now at your Lordships' Bar, with regard to the order which has been made in *Ireland*.

Having had the full advantage of counsel having been allowed to intervene, and having in fact intervened, and of having had their case, so far as they thought fit to put it forward, argued by counsel, the Appellants do not come here to reverse anything that has been obtained adverse to that counsel's argument, but they come here really for the first time to raise a controversy which they never raised before, and as to which your Lordships' House is not in the habit of granting a hearing by way of appeal. And, still farther, the case which is now proposed to be argued before your Lordships' House was not suggested even by the parties in the Court below.

My Lords, under that state of circumstances, if there has been any mistake one must regret it, but I can hardly conceive that there can have been an error or a mistake as to the advice which they received; because, as I said before, all the Appellants at your Lordships' Bar appear to have had the advice of counsel, and to have had every advantage that a suitor may expect in the Courts of *Ireland*, yet in spite of that they have not (one supposes advisedly) put themselves in such a position that they can now claim at your Lordships' Bar to be entitled to be heard in

opposition to any order that has been made with regard to which they have had an opportunity of taking the fullest part, and have not chosen to do so.

LORD O'HAGAN :—

My Lords, it is impossible, according to the ordinary course of proceeding and the established practice of your Lordships' House, that this appeal should be entertained. But I am extremely anxious, with my noble and learned friends who have preceded me, that in adhering to that practice, by which we are bound as much as if it were the statute law of the land, we should not be supposed in the least degree to intend to abridge, or to abridge in fact, any of the rights and privileges given to tenants in *Ireland* by the *Bright* clauses of the *Irish Land Act*. Those clauses are, in my opinion, of the highest value. They have, unfortunately, failed of accomplishing all the practical results designed by their authors, and I trust that the causes which have so largely defeated their operation may be speedily removed. But it must be understood that the decision of your Lordships is a decision upon procedure, and not at all upon the merits of the case, and rests altogether upon the special facts and the conduct of parties in particular and exceptional circumstances. To me it is matter for much regret that the gentlemen who assumed the position of trustees for the tenants now seeking to be heard at the Bar of this House, and who to a certain point maintained that position, should now have abandoned it, and so precluded the persons who had abstained, in reliance on their intervention, from formally offering evidence or argument in assertion of their claims. The reasons which prevent us from hearing them have already been clearly stated.

Under an order of the Irish Landed Estates Court, a very large number of tenants came forward, and made biddings for their several holdings; and those biddings, I gather from the papers before us, were entertained and considered by that tribunal. Thereupon a gentleman who wished to obtain the entire property made a large offer, which seems to have been favoured by the persons beneficially entitled. The tenants continue anxious to become the purchasers of their holdings, and for some reason or

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other (we are not informed as to the details or the relations of the parties) Messrs. *Lombard* and *Murphy* undertook to act for them, and made a bidding on their behalf. Nobody can doubt, looking at the terms of the proposals which they made, that they acted not for their own benefit, but as the friends of the tenants, and accepted the responsibility of conducting the transaction in the hope that it might so be most successfully accomplished for the intending beneficiaries. In the formal offer made by Messrs. *Lombard* and *Murphy* the purchase is expressly said to be proposed for the protection of the tenants in their interests, and to secure for them their respective farms. Now, it is quite clear that from the moment when that offer was made for the entire property, with the assent of the tenants, they practically withdrew the individual offers which they had made before. The whole circumstances of the case were changed. Messrs. *Lombard* and *Murphy* became the actors as against Mr. *Hussey*, the competing purchaser, and the Court had only to determine between them. Thenceforward, so far as that Court was concerned, the tenants vanished from the case, save for the purpose of sustaining the offer made by Messrs. *Lombard* and *Murphy*, which was accepted at first.

Then, the case went to the Appellate Court, and there the only persons who were actors were, *Lombard* and *Murphy* upon one side, and *Hussey* upon the other. *Lombard* and *Murphy* and *Hussey* gave the ordinary notices. The tenants were allowed to appear, but they did not, nor did they give any notice that they would, assert any special claims of their own. In the Appellate Court they did what they had done in the Court below: they expressed approval of the offers for the whole estate made by *Lombard* and *Murphy*. The Court of Appeal, for reasons of which we have no means of judging, and on which we are not required to form an opinion, thought proper to set aside the order made by the Landed Estates Court. According to Mr. *Herschell's* argument, the tenants might then have reverted to their original position, and renewed their individual offers, and pressed their individual claims. It is not necessary to consider the value of the argument, for they did nothing of the kind. They did not ask the Appellate Court to accept them as several purchasers. They manifestly relied on the action of *Lombard* and *Murphy*, and did not think of putting

forward any claim distinct from that which had been maintained by those gentlemen. They expected that the case would be fought out to the end without personal intervention of theirs; and they have come to the front only because their hope has been disappointed. And now an entirely new case is presented—a case never presented to the Court of Appeal, and withdrawn from the Landed Estates Court as soon as *Lombard* and *Murphy* made their appearance there. Your Lordships are asked, as an appellate tribunal, to adjudicate upon a cause and between parties wholly different from those with which and with whom the Court whose decision is impeached was called on to deal. You cannot do so according to any recognised rule of practice, or any reasonable principle of law, or without the risk of grave injustice; and, therefore, I feel obliged to concur with my noble and learned friends.

LORD BLACKBURN:—

My Lords, I am also desirous of stating that we do not here decide any question whatever upon the merits, and we cannot do so because they are not before us. There has been an order made in the Landed Estates Court which has been on appeal reversed, and another order has been made by the Court of Appeal. That would appear to raise the question which of these two is right. That we have no means of knowing, and as we have no means of forming an opinion, it would be improper to express a judgment upon it. But the point which is raised, and which we have to determine is this: supposing for the purpose of argument that the order of the Court of Appeal was wrong, are these persons, the Appellants who seek to come here, people who have a right to call upon this House to inquire whether it is right or wrong? Have they what is technically called a *locus standi?* That and that only I take it is the question before the House.

Now I do not wish to express any opinion at all as to the construction of the Landed Estates Acts, or as to what matters were discretionary, upon what matters there are no appeals, and upon what matters there are appeals, and as to how they should be determined. Those are important questions which will have to be determined when they arise, but they do not arise at present.

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The one point only which we have to consider is sect. 46, upon which so much has been said, which says :—[His Lordship read it, see *ante*, p. 738]. Now in that section, direction is given to the Landed Estates Court as to what that Court is to do. There is also a positive order that if the occupying tenant comes and makes an application he shall be heard, and when he has been heard there arises the rather complicated administrative question whether or not his request can be complied with that he may purchase his holding, due regard being had to the interests of the persons interested in the estate and the purchase-money. That would be a question for the Court, and that the Court will have to decide, and whether it will be subject to appeal or not, is not a question before the House upon which any order can be made. I take it that it is perfectly clear, indeed it is one of the plainest rules of common sense, that before any one could appeal, or complain that his application was not heard, he must have made an application to hear it. It cannot be for a moment supposed that the occupying tenant may stand by and see everything going on, the estate being sold, and all the proceedings taking place, make no application to have his offer accepted, ask for nothing, but stand by until it suits him to come forward, after a long litigation and a great deal of trouble and expense, upon the other side. It is plain that, before he can make a complaint, that his application has not been heard, he must in due time have made it, and have persevered in it until he has been told that the Court declines to act upon it.

My Lords, in this case, without deciding anything more, I think it is plain that these persons who seek to be Appellants here have never taken those steps. There have been several tenants who have made offers to purchase their several holdings. Mr. *Hussey* offered £80,500 for the estate, and some of the tenants seem to have made a bargain with him that they should be favourably dealt with, and they supported Mr. *Hussey*. Some of them who received leave to intervene in the Court, might have made an application to purchase their holdings, and having made an offer to purchase their holdings, they might have made an application to the Landed Estates Court to give effect to their offer. Whether if they had done so the Landed Estates Court would have refused

to hear them, and they could have appealed, that is to say, whether an appeal would lie in such a matter, is a point upon which I give no opinion.

What they did was this; perhaps because their counsel thought they had no chance if they went on making the application for themselves as individual tenants, or perhaps for some other reason, I do not know what, they seem entirely to have abandoned their notion of making any application, on their own behalf, under the 46th section, and they put forward Messrs. *Lombard* and *Murphy*, who then made the proposal, and offered to buy the estate for £81,000, and these parties, now seeking to be Appellants, supported them in that offer. It was argued by Mr. *Herschell* in this way: he said that they did not formally waive their application. I think it is enough to say that they never made the application, and they never applied to the Court to take steps to enforce their wish to buy their separate holdings. What they did in substance say was this: We are not going to urge such a claim; instead of that we make common cause with Messrs. *Lombard* and *Murphy*, and urge you to accept their offer which we support. Mr. *Hussey* and Mr. *Hussey's* fraction of tenants opposed that, and when they came before the Landed Estates Court, the Court decided in favour of Messrs. *Lombard* and *Murphy*, and then Mr. *Hussey* and the Petitioner, the vendor, united in an appeal to the Court. Whether or not there would have been time for the present Appellants to make an appeal to the Court I do not inquire, but they did not do it. They applied again to be allowed to intervene, they got leave to intervene, and did intervene, and they used that power not to say, If you set aside both we will take some steps to obtain our rights under the Act, nor even to say, Set aside the order confirming the sale to Messrs. *Lombard* and *Murphy* and accept our proposal. They did not even say: If you accept that and direct our claims under the *Bright* clauses to be considered, we make the application now. Nothing of the sort was said. Messrs. *Lombard* and *Murphy* fought the battle, and then perhaps because they found that it was not a very profitable investment to give £81,000 for the purchase of such a property, or whatever the reason might be, they withdrew from the matter altogether. Then these occupying tenants

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would seem to say, Under the *Bright* clauses by which the Landed Estates Court is to hear our application, which we did not make when it was in good time, we now, after a long time has elapsed, and the decision of the Court of Appeal is given, wish the House of Lords to hear us.

My Lords, I am clearly of opinion that that is not according to the Act of Parliament, and I am clearly of opinion also that it is contrary to all rules of justice to allow such an order to be made.

Petition and appeal not allowed to proceed, as being incompetent: the Appellants to pay to the Respondents, H. L. Pemberton and S. M. Hussey, the costs incurred by them by reason of the said petition and appeal.

Lords' Journals, 29th July, 1879.

Solicitors for Appellants: *Wynne & Sons.*

[HOUSE OF LORDS.]

DAVID AITCHISON AND A. F. BRANDT . APPELLANTS; AND HAAGEN ALFSEN LOHRE . . . . . RESPONDENT.

H. L. (E.) 1879 July 15, 18, 31.

Policy of Marine Insurance—Indemnity—Partial Loss—Value of Ship—Suing and Labouring Clause—Costs.

A policy of marine assurance is not a contract of mere indemnity.

General average and salvage do not come within either the words or the object of the suing and labouring clause of a policy of marine assurance.

Salvage expenses are not assessed upon the *quantum meruit* principle, but on the general principle of maritime law, rewarding persons who by great, and perhaps dangerous, exertions bring in a ship, for which exertions, if not successful, nothing would have been paid.

The assured, who had not abandoned, but had elected to repair, after damage sustained from perils of the sea, was *held*, therefore, not entitled to recover under that clause the expenses of salvage.

But *held* that, up to the amount insured, he was entitled to recover the cost of repair, with the reduction of one third new for old, even although the amount, calculated upon that principle, should exceed the amount that would be payable upon a total loss with benefit of salvage, and should equal the whole sum insured.

The ship *Crimea* was insured with the Defendant for £1200, being valued in the policy at £2600. It encountered very bad weather, and was in danger of sinking: it was rescued by a steamer, which obtained from the Irish Court of Admiralty £800 as salvage money. The owner did not abandon, but elected to repair. The Defendant's proportion of the repair expenses amounted (after the deduction of one third new for old) to £1200, the full sum he had insured, and he was held liable to that amount; but was held not to be liable to any part of the salvage expenses.

There were cross appeals. Neither party was completely successful. No costs were given.

APPEAL against a decision of the Court of Appeal, which had partly sustained and partly varied a previous decision of the Queen's Bench Division.

A policy of insurance for £1200 had been effected on a vessel called the *Crimea* for a voyage from the *Clyde* to *Quebec* or *St. John's*, and thence to the *United Kingdom*. The policy was in the usual form, and contained the usual suing and labouring clause. The Defendant paid into Court the sum of £1080. The Plaintiff replied, denying the sufficiency of the sum thus paid in. A

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special case was stated for the opinion of the Court, which was to be at liberty to draw inferences of fact (1).

The policy was for £1200. The ship was, in the policy, valued at £2600. The real value was stated to be £3000. The outward voyage was performed in safety. On the homeward voyage the ship encountered such severe storms that it was in danger of being lost, when it was saved and carried into *Kingston Harbour* by the steamer *Texas*, to which the Irish Court of Admiralty afterwards awarded £800 for salvage.

The ship was nearly sixteen years old, and its value as it lay damaged in the docks after the storms was stated to be £998. The owner did not give notice of abandonment, but signed a contract for repairs for a sum of £2982. The repairs were executed at that sum. The amount of salvage and general average expenses borne by the ship was stated to have been £519. The ship had not before been metalled, but it was metalled in the docks at a cost of £695. That was not sought to be made a charge against the underwriter. The whole sum expended on the ship was stated in the case to have been £4414. This was subject to the ordinary deduction of one third new for old. The value of the ship after all the repairs had been effected was estimated at £7000. Putting together the charges which the Plaintiff contended he was entitled to claim against the underwriter, they amounted to £1707. The claim was resisted on the ground that there had only been a partial and not a total loss, actual or constructive, and that the underwriter could not be made liable, on a partial loss, to a greater amount than in the case of a total loss, in which he would have the benefit of salvage. The Queen's Bench Division had decided that the cost of repair, making the usual deduction of one third new for old, was the measure of the loss if the shipowner elected to repair; and consequently that the assured was entitled to recover such cost of repair up to the amount insured for, even though the loss so estimated might amount to more than a total loss with benefit of salvage. But the assured was held not entitled to recover any portion of the salvage expenses over and above the £1200 (2).

(1) See 1 Q. B. D. 502; 3 Q. B. D. 558, where the circumstances are fully detailed.

(2) 2 Q. B. D. 501.

The Plaintiff, the shipowner, appealed against the last part of the decision; the Defendant, the underwriter, appealed against the first part. The judgment was affirmed as to the claim for the expenses of repair, but it was reversed so far as related to the salvage expenses, they being added to the amount for which the policy was underwritten (1). This appeal was then brought.

Mr. *Benjamin*, Q.C., and Mr. *J. C. Mathew*, for the Appellant:—

There was no total loss; if there had been, the underwriter would have been liable upon that, but then he would have had the benefit of salvage. There was only a partial loss, and that being so, the underwriter cannot be made liable to the full amount of the sum insured, as if there had been a total loss, and made so liable without benefit of salvage. Yet that is the claim here. Such a claim cannot be supported. "A partial loss is one in which the insurers are liable to pay an amount less than that insured for damage happening to the subject, or expense incurred and occasioned by the perils insured against, in distinction from a total loss, in which the insurer is liable to pay the entire value at which the subject is insured": *Phillips* on Insurance (2). What is sought to be done here would completely destroy that distinction, and subject the insurer to the payment of a larger amount than if the subject had been entirely lost. It is admitted that the assured is not bound to abandon; all the authorities agree in that: *Phillips* (3). But then he must not repair at a cost which exceeds the sum insured, and make a profit at the expense of the insurer, for an insurance is not to become a source of profit to the assured; *Emerigon* (4). The assured is entitled under his policy to be indemnified against loss, but not to be put, at the cost of the insurer, into a better position than at the commencement of the voyage and before any loss had happened. If he could do that, he could in this case charge for the metalling of the ship, which was admitted to be entirely out of the calculation. As the case now stands, the assured, by getting a ship worth £7000, instead of £3000, will be largely benefited. That was not the intention of a policy of insurance, which is purely a contract of indemnity.

And it is undoubtedly clear that the insurer is not liable for the

(1) 3 Q. B. 558.
(2) Chap. xvi. s. 1422.
(3) Chap. xvi. s. 1493.
(4) Chap. i. s. 3.

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salvage expenses. They do not properly come within the meaning of the suing and labouring clause. Such expenses are only chargeable when incurred with the object of avoiding a total loss, or of reducing a total loss to a partial loss, in other words, for the benefit of the insurer: *Arnould* (1). They could not in any way benefit the insurer here, for there had been no abandonment, and, except upon abandonment, he cannot obtain anything from salvage. That was the position laid down by Mr. Justice *Lush* in delivering the judgment of the Queen's Bench Division (2), and that is the reasoning in *Phillips* on Insurance on this question (3). The case of *Kidston* v. *The Empire Marine Insurance Company* (4) did not establish the construction for which the assured now contends, for that was the case of an insurance on freight; the expenses were incurred in order to save the freight, and the freight was saved, and the underwriter was in that way subjected to a smaller loss, and so the suing and labouring clause was held to apply, but it had no application to this case. There is nothing in common between the two cases. But even in that case Mr. Justice *Willes* (5) expressly says, "That clause must be limited in application to cases in which the underwriter might incur liability, and therefore might derive a benefit from the extraordinary exertion." He could derive none here, and so was not to be made liable for the expenses of that exertion.

Mr. *Cohen*, Q.C., and Mr. *F. W. Hollams*, for the Respondent, were desired to confine themselves to the second point, that which related to the claim for salvage expenses.

Those expenses were absolutely necessary to be incurred, and were like those which were incurred in getting a ship off rocks in order to bring it into dock to be repaired; and such expenses were always held to be properly included in the expenses for repairs. In *Lidgett* v. *Secretan* (6) no doubt was suggested as to all the expenses incurred in bringing the vessel into dock, and the dock dues for keeping it there, up to the time of the fire which destroyed it. There is not, in the suing and labouring clause, any expression of such a restrictive meaning as is now sought to be put on that

(1) 5th Ed. p. 245, 779.
(2) 2 Q. B. D. at p. 508.
(3) Chap. xvii. s. 1716.
(4) Law Rep. 1 C. P. 535; affirmed, Law Rep. 2 C. P. 357.
(5) Law Rep. 1 C. P. 550.
(6) Law Rep. 6 C. P. 616.

clause. On the contrary, the insurer binds himself to contribute to the charges in the "defence, safeguard, and recovery" of the goods and ship, and sums paid for labour and exertions in securing the vessel from total destruction may well come within that description.

Mr. *Mathew* replied.

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LORD BLACKBURN :—

My Lords, in this case the Respondent insured £1200 on a ship, the *Crimea*, valued in the policy at £2600, with the Appellant's company, on a voyage out and home. The policy was against all the usual perils, and contained the usual suing and labouring clause.

The Appellants paid into Court £1080, being at the rate of 90 per cent. on £1200, and the question was whether, under the circumstances stated in a special case, this sum was sufficient, or if not, how much more the Plaintiff below, (the Respondent in this House,) was entitled to recover. The Queen's Bench Division was of opinion that the amount recoverable was £1200, or 100 per cent., and gave judgment for £120 beyond the amount paid into Court. Both sides appealed, and the Court of Appeal was of opinion that the sum recoverable was 100 per cent. in respect of the direct damage to the ship, and a farther percentage in respect of the salvage and general average charges. The record was so imperfectly drawn up that it does not appear on it what was this farther percentage. The counsel at the Bar of this House agreed that if the judgment of the Court of Appeal was affirmed, that percentage should be some rate which they agreed on between themselves. Some anxiety was expressed lest it should be supposed that in sanctioning this agreement, this House would determine some question of principle which was given up by one side or the other as of no practical importance in this case, though it might be of importance in other cases. The House certainly determines no such point, and indeed was never informed what this point was.

It appears from the statements in the case that the *Crimea* on the voyage home during the month of January encountered a succession of stormy weather, and in consequence of the perils of

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the seas great damage was done to her, and she was reduced to a leaky and water-logged condition. It appears, incidentally, that some general average had arisen, for a proportion of which the ship was liable. The case then states that "On the 30th of January, the ship, being then in great danger of being completely lost, and being without fresh water or provisions, and in a helpless condition and not capable of being navigated, those on board of her sighted the steamship *Texas*, which ultimately took her in tow, without any agreement being come to as to remuneration for the service, and took her into *Queenstown*, and on or before the 11th of March she was placed in safety near the wharf of the *Victoria Dry Dock Company*."

It may be as well here to point out that the liability of the articles saved to contribute proportionally with the rest to general average and salvage, in noways depends on the policy of insurance. It is a consequence of the perils of the sea, first imposed, as regards general average, by the Rhodian Law many centuries before insurance was known at all, and, as regards salvage, by the maritime law, not so early, but at least long before any policies of insurance in the present form were thought of. No claim for remuneration from the owner is given by the Common Law to those who preserve goods on shore, unless they interfered at the request of the owner: *Nicholson* v. *Chapman*. There Chief Justice *Eyre*, in delivering the considered judgment of the Court, says (1), that in respect of salvage, "the laws of all civilized nations, the laws of *Oleron*, and our own laws in particular, have provided that a recompense is due for the saving, and that our law has also provided that this recompense should be a lien on the goods which have been saved. Goods carried by sea are necessarily and unavoidably exposed to the perils which storms, tempests, and accidents (far beyond the reach of human foresight to prevent) are hourly creating, and against which it too often happens that the greatest diligence, and the most strenuous exertions of the mariner, cannot protect them. When goods are thus in imminent danger of being lost it is most frequently at the hazard of the lives of those who save them that they are saved. Principles of public policy dictate to civilized and commercial countries not

(1) 2 H. Bl. 254, at 257.

only the propriety but even the absolute necessity of establishing a liberal recompense for the encouragement of those who engage in so dangerous a service . . . Such are the grounds upon which salvage stands; they are recognised by Lord Chief Justice *Holt* in *Hartfort* v. *Jones*" (1).

The *Crimea* had been before these disasters worth £3000; as it then lay in a damaged condition it was of the value of £998. The damaged ship was liable to make good its proportion of the general average and of the salvage incurred for the preservation of ship, freight, and cargo; and that proportion of the two taken together amounted to £519 0*s.* 1*d.*

My Lords, I think it convenient to pause here and inquire what would have been the loss to an uninsured owner from the perils of the seas under such circumstances. If such an uninsured owner chose to sell the hull as it lay, his position would be this: he would lose the value of the ship, £3000. He would receive £998, the value of the hull, less £519, the amount of general average and salvage which was a charge on the hull, or £479; and his loss would be £2521. And if the hull had been so damaged that to repair it would have cost more than the ship would, when repaired, have been worth, the prudent shipowner would have taken this course. But in fact he not only could, but did repair it, and by an outlay of about £5600 (part of which, about £1200, was for new works), he made the ship worth £7000; and then (still assuming him to be uninsured) his position would have been this: original value of ship, £3000; salvage and average, £519; expenditure, £5600; total, £9119; value of repaired ship, £7000; loss £2119, to which are to be added some particular charges amounting to apparently £235, bringing the loss up to £2354.

The contract of insurance is a contract of indemnity, and, if it could be worked out as a perfect indemnity, it would follow that 90 per cent., the sum paid into Court, which on £3000 amounts to £2700, was more than sufficient. But as was said in the opinion of the Judges in *Irving* v. *Manning* (2), "A policy of assurance is not a perfect contract of indemnity; it must be taken with some qualifications." One of those is commonly expressed as the allowance of one-third for new for old; and it is on the

(1) 1 Ld. Raym. 393.

(2) 1 H. L. C. 287, at p. 307.

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application of that to the present case that the first question arises.

The owner of an insured ship which is so damaged that, though it is capable of repair, the expense of repairing it will exceed its value, may treat the ship as totally lost, and recover a total loss, the underwriters who pay that total loss being entitled to all that is saved. The assured is not, even then, bound to do so. But if the ship can be practically repaired within the meaning of that phrase, as explained by Mr. Justice *Maule*, in *Moss* v. *Smith* (1), the assured has not the option to treat it as a total loss; and on the figures stated in the special case the Respondent here had not that option. He may repair the damage done by the peril insured against, and if he does so the damage would, in general, be what would be the reasonable cost of making the ship as good as it was before. The actual outlay on the repairs, if *bonâ fide* made, would be strong evidence what the reasonable cost was, and if the ship was by that outlay made more valuable than it was before the accident, which would generally be the case with an old ship, there should be an allowance for this increased value. It is obvious that, applying this, there would be great room for disputes and litigation on the adjustment in every case where repairs were executed, whether the repairs were extensive or not.

In the present case, where the ship was fifteen or sixteen years old, and the damage was extensive, it is probable, as is said in the judgment of the Queen's Bench Division, that the extent to which it was benefited by having new materials instead of old was much more than one-third of the expenditure; probably two-thirds might be nearer the fact. But I think that it is clearly established by a long course of practice, and by many decisions, that, for the purpose of avoiding the expense of litigation, a custom of trade has arisen which, though not written in the policy, is implied in it. The parties to a policy of insurance on a ship tacitly agree that, in case of repairs fairly executed to replace damage occasioned by one of the underwritten perils to a ship of the age and character to which the custom applies, the loss shall be estimated at two-thirds of the cost of the repairs, neither more nor less. It is self-evident that this can very seldom

(1) 9 C. B. 94, at p. 103; 19 L. J. (C.P.) 225, at p. 228.

be the accurate measure of the loss. In most cases the rule operates favourably for the underwriter, as the shipowner in spending money on repairs seldom benefits his ship to the extent of one-third, and in such cases the payment of the sum so fixed by custom falls short of a perfect indemnity. In some cases, and this is one, the benefit to the ship exceeds one-third, and there the assured receives more than a perfect indemnity. But if it were lawful to open up the question and depart from the rule in any case, the whole object of it, which is to avoid litigation and expense, would be frustrated. No authority has been cited, and as far as my knowledge goes, no authority exists, for any qualification of the general rule which would take this case out of it. If the rule applies, two-thirds of the expenses of repairing the sea damage are to be charged to the ship. The expenses of making additions to the ship are not of course to be charged; they are not in any way a consequence of the perils of the sea. The arbitrator has found that the expenses to which the rule is applicable were £4414 18*s.* 11*d.* This finding is binding. Now two-thirds of this sum is in round numbers £2943, or very nearly 100 per cent. on £3000. According to the finding in one paragraph there are other particular charges on the ship, the nature of which is not stated, which bring up the loss to £3178 11*s.* 7*d.*, which is more than 100 per cent.; and if the salvage and general average expenses are added the loss will be very considerably more than 100 per cent.

In *Phillips* on Insurance (1), that very experienced author finds great fault with the decision of the Court of Common Pleas in *Le Cheminant* v. *Pearson* (2) (so long ago as 1812), that more than the subscribed amount may be recovered where there are successive losses, which he seems to think can only be supported on the ground of inveterate practice. No question, however, of that kind however arises here, for this is a case of one single loss; as to which he says that we know "The liability of insurers in a single loss is without question limited to the amount insured, and the expense of suing," &c. No authority in contradiction to this was cited, and I am not aware of any; and the position thus laid down in *Phillips* was adopted by all the Judges below, who consequently

(1) Sect. 1743; see also sect. 1136. (2) 4 Taunt. 367, at p. 380.

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limited the amount recoverable under the policy, as far as it related to the indemnity for the underwritten perils, to 100 per cent., or in this case £1200, or £120 beyond the amount paid into Court, I think it clear that they were right both in going so far, and also (which I think was scarcely contested at the Bar) in not going farther. On this, the first question, on which both the Courts were agreed, the judgment below should be affirmed.

But there is a second point on which the Courts below differed The policy contains the usual clause as to suing or labouring. The Queen's Bench Division was of opinion that the salvage, or general average expenses, described in the case did not come within that clause. The Court of Appeal was of a different opinion. In the judgment delivered by Lord Justice *Brett*, it is said (1) that "the general construction of the clause is that if, by perils insured against, the subject-matter of insurance is brought into such danger that, without unusual or extraordinary labour or expense, a loss will very probably fall on the underwriters, and if the assured or his agents or servants exert unusual or extraordinary labour, or *if the assured is made liable to unusual or extraordinary expense in or for efforts* to avert a loss, which, if it occurs, will fall on the underwriters, then each underwriter will," &c. Now if the part of this which is above emphasized is correct, there can be no question that both salvage and general average are unusual expenses to which the assured have become liable in consequence of efforts to avert a loss. And such seems to be the opinion of the editor of the last edition of *Arnould* on Insurance, who says (2) that salvage "is recoverable from him in virtue of an express clause in the policy inserted for such a case, and known as the sue and labour clause;" but for that position he cites no authority, and though the Court of Appeal in this case agreed with him, I am unable to do so. With great deference to the Judges of the Court of Appeal, I think that general average and salvage do not come within either the words or the object of the suing and labouring clause, and that there is no authority for saying that they do. The words of the clause are that in case of any misfortune it shall be lawful "for the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence,

(1) 3 Q. B. D. at p. 566. (2) 2 Arn. 5th Ed. at p. 778.

safeguard, and recovery of" the subject of insurance, "without prejudice to this insurance, to the charges whereof we the insurers will contribute." And the object of this is to encourage and induce the assured to exert themselves, and therefore the insurers bind themselves to pay in proportion any expense incurred, whenever such expense is reasonably incurred for the preservation of the thing from loss, in consequence of the efforts of the assured or their agents. It is all one whether the labour is by the assured or their agents themselves, or by persons whom they have hired for the purpose, but the object was to encourage exertion on the part of the assured; not to provide an additional remedy for the recovery, by the assured, of indemnity for a loss which was, by the maritime law, a consequence of the peril. In some cases the agents of the assured hire persons to render services on the terms that they shall be paid for their work and labour, and thus obviate the necessity of incurring the much heavier charge which would be incurred if the same services were rendered by salvors, who are to be paid nothing in case of failure, and a large remuneration proportional to the value of what is saved in the event of success. I do not say that such hire may not come within the suing and labouring clause. But that is not this case. The owners of the *Texas* did the labour here, not as agents of the assured, and being to be paid by them wages for their labour, but as salvors acting on the maritime law, which, as explained by Lord Chief Justice *Eyre* in *Nicholson* v. *Chapman* (1), already cited, gives them a claim against the property saved by their exertions, and a lien on it, and that quite independently of whether there is an insurance or not; or whether, if there be a policy of insurance, it contains the suing and labouring clause or not. The amount of such salvage occasioned by a peril has always been recovered, without dispute, under an averment that there was a loss by that peril; see *Cary* v. *King* (2); and I have not been able to find any case in which it was recovered under a count for suing and labouring. I do not much rely on this, for it is very likely that such counts often were in the declaration, and that therefore no inquiry was made whether the loss was recoverable under one count or another; but at least there is no authority for the

(1) 2 H. Bl. at p. 257. (2) Cas. t. Hardw. 304.

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position that salvage (properly so called) was recoverable under that count.

There have been very few cases in our Courts in which it has become necessary to discuss the nature of the suing and labouring clause. *Kidston* v. *The Marine Insurance* (1) is, I think, the only one in which there has been a recovery under it. There, however, all the extra labour was directly and voluntarily employed by the agents of the assured; and the charges were paid by them in consequence of this employment. In the very able and elaborate judgment of Mr. Justice *Willes* not a word can be found to countenance this extension of the construction of the clause beyond what seems to me both its language and its object; and, except the passage introduced for the first time into *Arnould* by the present editor, I can find nothing in any text-book tending to support it. I therefore think that the judgment of the Court of Appeal should be reversed and that of the Queen's Bench Division restored.

As there are cross appeals and neither party is completely successful, I should say that there should be no costs of either party either in the Court of Appeal or in this House, and that the Respondents should have only the costs in the Queen's Bench Division as given by that judgment. I beg to move your Lordships to that effect.

THE LORD CHANCELLOR (Earl *Cairns*):—

My Lords, I have had the advantage of reading the observations which my noble and learned friend has just made in this case, and, concurring as I do entirely in the view which he has taken, I do not think it necessary to travel over the same ground again.

I will only make one observation with regard to salvage expenses. It appears to me to be quite clear that if any expenses were to be recoverable under the suing and labouring clause, they must be expenses assessed upon the *quantum meruit* principle. Now salvage expenses are not assessed upon the *quantum meruit* principle; they are assessed upon the general principle of maritime law, which gives to the persons who bring in the ship a sum quite

(1) Law Rep. 1 C. P. 535.

out of proportion to the actual expense incurred and the actual service rendered, the largeness of the sum being based upon this consideration—that if the effort to save the ship (however laborious in itself, and dangerous in its circumstances) had not been successful, nothing whatever would have been paid. If the payment were to be assessed and made under the suing and labouring clause, it would be payment for service rendered, whether the service had succeeded in bringing the ship into port or not.

Now it may be said that that only goes to the amount sought to be recovered, but it appears to me to go farther, and to go to the very principle upon which the attempt is made to recover the amount in question. It shews that the salvage expenses were not expenses incurred under the suing and labouring clause by the owner of the ship, but were a payment which the ship, as an actual chattel, had to submit to by maritime law, and would be obliged to make good in proceedings against the ship *in rem.*

My Lords, as regards the order which this House should be asked to make, I wish to point out to your Lordships that in the Court of Appeal there were, an appeal and a cross-appeal against the decision of the Queen's Bench Division. There was an appeal by the underwriters, upon the ground that they ought not to have been made to pay the whole sum insured; and there was a cross-appeal by the shipowner in respect of these salvage expenses, which the Queen's Bench Division had not allowed. The appeal by the underwriters was dismissed with costs, and that decision appears to me to have been perfectly right. The cross-appeal by the shipowner in respect of salvage expenses succeeded, with costs, in the Court of Appeal. Your Lordships, I think, will reverse that decision, and of course that would dispose of the costs as to that cross-appeal. Then, inasmuch as there is only one appeal before this House—the appeal by the underwriters, who complain now both of the determination which has made them pay the 100 per cent., the full insurance, and also of that which has made them pay the salvage expenses; and as they will succeed, as I should think, upon one of those points, and fail upon the other, your Lordships will, I assume, think it right that there should be no costs of the appeal to this House. Therefore, what

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I should propose to your Lordships would be, that the judgment of the Court of Appeal, in so far as it varied the judgment of the Queen's Bench Division, should be reversed; that the judgment of the Court of Appeal, in so far as it dismissed the Appellant's appeal against the judgment of the Queen's Bench Division, be affirmed; and that your Lordships should declare that the cross-appeal to the Court of Appeal ought to have been dismissed with costs, and order costs to be paid accordingly; and that there should be no costs of the appeal to this House.

LORD HATHERLEY:—

My Lords, I only desire to say that I entirely concur in the opinions which have been expressed by my noble and learned friends. I have had an opportunity of perusing the opinion which has just been delivered by my noble and learned friend opposite (Lord *Blackburn*), and having read it carefully, I may say that upon both the points of the appeal upon which he has touched I concur in the view he has taken, namely, that it is very clear that the damage done extends to 100 per cent., that is to say, extends to the whole amount of the money insured; and that it is equally clear, as it seems to me, that the suing and labouring clause was inserted by the underwriters for the purpose of securing the benefit of any pains that the shipowner might be inclined to take in preserving, for their benefit, as much as he possibly could preserve. But that does not apply to a case like the present, where the salvage seems to have been an ordinary sort of salvage, namely, a ship perceiving another at a distance and in a state of distress comes to the rescue, no bargain being made. We were expressly told in the case that no bargain was made as to any remuneration which should be given, but it was rescued upon the simple and common principle of salvage. There does not appear to be any authority shewing it to be a case coming within the suing and labouring clause. I think, therefore, that the separation of the two points has been correctly made, and that your Lordships should concur on the one point in the judgment pronounced by both the Courts below, and on the other point in the judgment pronounced by the Queen's Bench Division, as distinguished from that pronounced by the Court of Appeal.

LORD O'HAGAN:—

My Lords, I also have had the advantage of perusing the very careful and exhaustive opinion which has been read by my noble and learned friend (Lord *Blackburn*). I entirely concur in the substance of that opinion, and I feel that I could add nothing of material value to the reasonings and conclusions it has so well expressed.

I have had some grave doubts as to the second point with reference to the operation of the suing and labouring clause, but upon the whole I do not see sufficient reason to differ from the views which have been adopted by your Lordships.

Ordered:—*That the judgment of the Court of Appeal in so far as it varied the judgment of the Queen's Bench Division be reversed.*

That the judgment of the Court of Appeal in so far as it dismissed the Appellant's appeal against the judgment of the Queen's Bench Division be affirmed.

Declared that the cross appeal to the Court of Appeal ought to have been dismissed with costs; costs ordered to be paid accordingly.

No costs of appeal to this House.

Lords' Journals, 31st July, 1879.

Solicitors for Appellants: *Walton, Bubb, & Walton.*
Solicitors for Respondent: *Hollams, Son, & Coward.*

[HOUSE OF LORDS.]

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THE LORD ADVOCATE AND THE TRUSTEES OF THE CLYDE NAVIGATION . } APPELLANTS;

LORD BLANTYRE AND ANOTHER . . . RESPONDENTS.

Property in Foreshore—Navigable Tidal River Boundary of Lands—Barony Titles containing no Express Grant of Foreshore followed by Prescriptive Acts of Possession.

Parties holding barony titles to lands situated on both sides of the *Clyde*, a navigable tidal river, claimed, as against the Crown and the *Clyde* Navigation trustees, that the foreshores *ex adverso* their lands belonged in property to them, subject to such rights of navigation or other rights which the public and the *Clyde* trustees might have over the same. The barony titles contained no express grant of foreshore, nor did they contain any specific boundaries which could be held to include the foreshore. The parties rested their claim on the grounds (1) that the barony titles alone gave them the property; (2) that coupled with their titles they had exercised from time immemorial acts of possession over the foreshore:—

Held, affirming the decision of the Court below, that the acts of possession for the prescriptive period having been proved, and following on barony titles to lands so situated, they constituted a right of property in the foreshore.

Held, also, that in this case it was not necessary to decide the question whether a barony title to lands so situated, which does not specify the exact boundary of the lands or contain any express grant of foreshore, could alone give a right of property in the foreshore.

See Lord *Blackburn's* opinion (p. 791), as to the weight of each act of possession, as evidence.

Agnew v. *Lord Advocate* (Court Sess. Cas. 3rd Series, vol. xi. p. 309) commented on.

THIS was an appeal against a decision of the First Division of the Court of Session, *Scotland*.

The only point seriously argued before the House was whether certain alleged immemorial acts of possession exercised over a great extent of foreshore had been sufficiently proved. The facts and evidence in the case are so fully given in the opinions of the Law Peers, and in Lord *Curriehill's* note, that only a very brief statement is necessary here.

The action was originally raised by the Respondents, Lord *Blantyre*, and his son, the Master of *Blantyre*, for a declarator that the ground forming the shores and banks of the River *Clyde* between high and low water mark *ex adverso* their barony of *Erskine*, which

includes the lands of *Bishopton* and *North Barr*, *Renfrewshire*, situated on the south side of the river; and of their baronies of *Kilpatrick*, *Dalnottar*, and *Colquhoun*, which include the lands of *Shorepark*, and *Glenarbuck*, *Dumbartonshire*, situated on the north side of the river, belonged in property to them as pertinents of their adjoining lands, but subject to any rights of navigation or other rights which the public might have over the same; and also subject to any statutory rights conferred upon the trustees of the *Clyde* Navigation.

Lord *Blantyre's* lands extend for about five miles along the south side and about two along the north side of the river, which here forms part of what is known as the estuary of the *Clyde*, being about twelve miles below the city of *Glasgow*. The extent of foreshore claimed is about 750 acres.

The action was originally directed against the Lord Advocate, as representing the Commissioners of Woods and Forests under 20 & 21 Vict. c. 44; but the trustees of the *Clyde* Navigation were subsequently made parties as Defenders in the Court below.

The Respondents' barony titles for the most part flow direct from the Crown, but do not specify the boundaries either of the baronies or of the component parts thereof.

The Respondents founded their claim to the foreshore: (1.) In virtue of their titles of barony alone; and (2.) In respect of their titles coupled with acts of possession exercised from time immemorial by them and their predecessors upon the foreshore. The acts of possession relied on by them were, *inter alia*, the pasturing of cattle on the sea greens, the regular cutting of reeds and seaweeds, in taking sand and stones for building purposes; and the granting permission to others to do so. They had also repeatedly prevented by legal process persons from removing sand and stones without permission; and had excluded the public from the foreshore. In fact they alleged they had used or permitted its use, and that on both sides of the river, for all the purposes for which ground of this description can be used.

The *Clyde* trustees insisted that the property of the ground claimed was vested in them by Acts of Parliament. The Lord Advocate, while he averred on record "that the respective rights and interests of the Crown and the trustees have never been judi-

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cially ascertained, but that he did not admit that the full right of property had been transferred to the trustees," in other respects stated identical pleas with those of the *Clyde* trustees, and equally with them disputed the Respondents' right of property in this portion of the foreshore.

There was no controversy with regard to any rights of, or incident to, navigation, or with regard to any of the other rights of the public in connection with the shore of a navigable tidal river.

A proof of the averments of the parties having been allowed, the Lord Ordinary (1) sustained the second ground of claim of

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(1) Lord *Curriehill* (the Lord Ordinary) in his note says :—

"(I.) *As to the Titles of the Pursuers, the Respondents.*—The whole of the lands belonging to the Pursuers, the foreshores of which are claimed by them in this action, are *de facto* bounded by the River *Clyde*, and they are for the most part held under barony titles flowing directly from the Crown, which, however, do not specify the boundaries either of the baronies or of the component parts thereof. The present barony of *Erskine*, which contains the whole of the Pursuers' lands on the *Clyde* except the lands of *Shorepark* and of *Glenarbuck*, is composed of three more ancient baronies, namely, the old barony of *Erskine*, the barony of *Dunnotter* or *Dalnottar*, and the barony of *Kilpatrick*, all of which were united into the new barony of *Erskine* in 1664, by a Crown charter in favour of *William Hamilton* of *Orbiston*.

"The old barony of *Erskine*, which lies on the south side of the *Clyde*, was a barony prior to 1620, and was in that year confirmed by *Charles*, the Prince of *Scotland*, in favour of *John*, Earl of *Mar*, and his heirs-male and assignees whomsoever, by a charter of confirmation and novodamus, by which that old barony, with the east and west ferries of *Erskine* and *Dumbarton*, and the lands of *Barne*, *Barnehills*, and *Aulands*, all in the county of *Renfrew*, were of new erected and united into a barony, to be called the barony of *Erskine*. The baronies both of *Dalnottar* and of *Kilpatrick*, which, as has been mentioned, were united in 1664 with the old barony of *Erskine*, and now form the existing barony of that name, lie on the north bank of the *Clyde*, opposite the policies of *Erskine House*. This new barony of *Erskine* was on the 21st of September, 1703, conveyed by the said *William Hamilton* of *Orbiston* to trustees for the purpose of being entailed on the Master of *Blantyre* and the heirs therein named. Certain parts of the barony, however, on both sides of the river had been sold or feued to third parties; but it is unnecessary to specify them particularly, because they have all been reacquired by the Pursuer, Lord *Blantyre*. In the conveyances of several of these subjects, the lands are expressly described as being bounded by the River *Clyde;* but in a question with the Crown such a description cannot, unless followed by prescriptive possession, be held as having divested the Crown of the foreshores, if the original barony titles do not imply such divestiture. The present question must, therefore, as to these lands be decided upon the construction of the general barony title.

the Respondents, finding that they had succeeded in proving acts of possession of a character, and extending over a length of time,

The Pursuer, Lord *Blantyre*, is now infeft in the whole property originally comprehended in the separate baronies of *Erskine*, *Dalnottar*, and *Kirkpatrick* or *Kilpatrick*, and now contained in the new barony of *Erskine* erected in 1664, all of which were in 1831 united with certain lands in *East Lothian* into a new barony called the lordship and barony of *Lennoxlove*.

"Whether the lands of *Shorepark* were ever part of any of these baronies does not very clearly appear, although I think it is not improbable that they formed part of the barony of *Kirkpatrick*. They are of small extent and no special question was raised by either party regarding them at the discussion; and as to them, I think it clear that their extent must be ascertained by the proof of possession.

"The lands of *Glenarbuck*, which form the westmost portion of the Pursuers' lands on the north bank of the *Clyde*, are part of the barony of *Colquhoun*. They were formerly known as the lands of '*Spittal*,' but they were in 1845 conveyed to the late Lady *Blantyre* and the Pursuer—Lord *Blantyre*—in liferent for their respective liferent uses allenarly, and to and in favour of the heirs of the marriage between them in fee, as 'the lands of *Spittal Cuningham*, now called *Glenarbuck*, extending to a 20*s*. land of old extent, with the fishing thereof, called the *Spittal* shot, in the water of *Clyde*, together with the mansion-houses and offices, the inn at *Bowling Bay*, offices and pertinents, and all other houses, buildings, parts, pendicles, and pertinents thereto belonging.' These lands are, like the greater part of the Pursuers' lands, held under a barony title.

"There is no longer any doubt, if such ever existed, that the foreshore of the sea and of navigable rivers, though belonging to the Crown, subject to certain public uses connected with navigation and the like, are nevertheless alienable by the Crown subject to such public uses. Such alienation may be made by express grant, or by a conveyance of land expressing the boundary to be the sea or river, or by a grant with parts and pertinents silent as to boundaries, but explained by possession to include the foreshore. And a grant of barony followed by possession has the like effect. But the Pursuer, Lord *Blantyre*, maintains that in virtue of his barony titles alone the foreshores and banks of the *Clyde* belong to him as pertinents of the barony, and that the grant of barony entitles him, without proving any possession, to follow the *Clyde* and appropriate its foreshores and banks, subject always to the rights of the public and of the *Clyde* trustees.

"This is a question of general importance, upon which at various times opposite opinions have been expressed by Judges and institutional writers of great eminence and authority, but which it has not hitherto been in any reported case found necessary to dispose of by judicial decision. And in the view which I am inclined to take of the present case generally, it is not necessary to pronounce any formal judgment upon the point. As, however, the parties are all desirous that an opinion should be expressed upon the point, I shall content myself by saying that I must regard the question as practically settled by the opinions delivered by the Judges of the Second Division in the recent case of *Agnew* v. *Lord Advocate* (21st January, 1873, 11 Macph. 309). In that case the

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sufficient to establish in them the property of the foreshores of the *Clyde ex adverso* of all their lands on both sides of the river, as

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Court decided that the Pursuer Sir *A. Agnew*, whose title was a barony title in which no boundaries were specified, had right to the foreshore of his lands, which were *de facto* bounded by the sea, in virtue of his titles and of the possession which had followed; but the Judges were unanimous in holding, although they did not make it matter of judgment, that without the proof of possession they could not have sustained the barony title alone as a sufficient title to the foreshore. The Lord Justice Clerk stated it to be his clear opinion that as Sir *Andrew Agnew's* titles 'contain no specific description of the component parts of the lands conveyed, and as no specific boundary of the barony or lands is expressed in them, the extent of the barony and lands can only be determined by the state of possession.' The other Judges expressed similar views—and although an appeal was presented against the judgment to the House of Lords by the Lord Advocate, it was abandoned, and the opinion of the Court must therefore be held as an authoritative statement of the law.

"This being so, I am of opinion that the Pursuers' claim to the property of the foreshore as belonging to them in virtue of their titles alone, cannot be sustained.

"(II.) *As to the Possession which has followed upon the Pursuers' Titles.*—They maintain that they have established by the proof that they and their predecessors have had possession of the foreshores on both sides of the river along their whole property, of such a character and for such a length of time, as to shew that the undefined grant of barony really included the foreshores in question. The proof clearly establishes, that from time immemorial Lord *Blantyre* and his predecessors have exercised upon the foreshores in question on both sides of the river nearly every conceivable right which an undoubted proprietor could have exercised. They have regularly, themselves or by their tenants, used for pasturing their cattle those portions of the foreshore which though covered at high water produced grass available for pasture. They have regularly cut the reeds which grew on the foreshore, and used the same for thatching and other purposes; and, until the supply failed, owing to the pollution of the water, they regularly cut the sea-weed which grew upon the foreshores, and carried off that ware as well as the drift ware for the purpose of manuring their lands. They have also carried away large quantities of sand and stones from the foreshore, and used the same for building houses and walls and forming roads upon the estate, and in particular, some thousands of cartloads of sand were taken for the construction of the new mansion-house of *Erskine*, the building of which was begun in 1824 and was not finished till 1835 or later, and for the formation of an approach to the new house. During the same period also, the rubbish and *débris* from the foundation of the new mansion-house and from the ruins of the old, were deposited in large quantities upon the foreshores of the policy grounds, and upon that great quantities of sand and soil dredged from the bed of the river have been at the request or with the permission of Lord *Blantyre* and his predecessors deposited on the foreshores, whereby the surface has been elevated above the level of high water, and has long been used as an addition to the

belonging to them in property as pertinents of their lands under their titles thereto. On a reclaiming note the First Division adhered to the Lord Ordinary's interlocutor (1).

arable or grazing ground of the estate. Similar operations have from time to time been performed on other parts of the foreshore on both sides of the river, whereby a considerable extent of ground has been reclaimed. Then above *Erskine* ferry on the south side of the river, and above and below that ferry on the north side, wharfs and harbours have been made upon the foreshores by Lord *Blantyre* and his predecessors. They have also been in use to grant permission to third parties to take away sand and gravel from the foreshore, and they have also repeatedly prevented, and by legal process have interdicted, many persons from removing such materials without their permission. They have also run fences across the foreshore in continuation of the boundaries of the several farms, so as to confine the stock on one farm to the pasturage on the foreshore opposite the same; and they have, with sand, gravel, and stones, taken from the foreshore, made extensive embankments along the margin of the river. They have also been in use regularly to shoot and fish upon the foreshores, to beach boats and land cargoes on the foreshore, and to do many other similar acts. They have also excluded the public from the foreshore, and indeed for many miles no access to the foreshore can be had except through the Pursuers' policy grounds. Now, none of these acts of possession, which, as I have said have been carried on for time immemorial (some of them having been proved to have taken place during last century), have ever been objected to or interfered with by the *Clyde* trustees, the Crown, or by any other persons.

"These acts of possession are not of the nature of a servitude, as the Defenders maintained them to be, and they can be attributed only to the exercise of a right of property. Had the possession been confined to acts of one particular kind, such as merely pasturing cattle or taking sea-weed, it might possibly have not been sufficient as an assertion of a right of property; but the various acts of possession above enumerated really seem to embrace every use of the subject of which it was capable, many of them involving the removal of the substance of the ground, and the conversion of the waste, muddy, or slimy surface into cultivated land. And unless the Crown or the *Clyde* trustees can establish that there has been divided possession, or such an interference with the actual possession of the Pursuers and their predecessors as to deprive it of the character of exclusive possession, I think it must be held that the Pursuers have established their claim to the property of the foreshores. It is therefore necessary to examine the grounds on which the several Defenders maintain that the possession of Lord *Blantyre* and his predecessors has not been that of proprietors.

"Had the present question been one merely between the Pursuers and the Crown, I should have had no difficulty in sustaining the claim of the Pursuers—(1) because the Lord Advocate has not succeeded in shewing that the possessions of the Pursuers and their

(1) Scottish Law Rep. vol. xv. p. 382.

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On appeal,

The Lord Advocate (Rt. Hon. *W. Watson*), Mr. *Benjamin*, Q.C., and Mr. *Marten*, Q.C., for the Appellants, denied that the predecessors has ever been interfered with; and (2) because the reservation with which the conclusions of the summons is qualified is amply sufficient to protect the interests of the public in the foreshores, and deprives the Crown of any interest to maintain that it has not been divested of these foreshores in favour of the Pursuers. The appearance of the *Clyde* trustees, however, in the proceedings, and the claims which they have put forward, undoubtedly complicate the case, and introduce an element of difficulty into the present question. These trustees maintain, not indeed in their pleas in law, but in their statement of facts, — and they have led proof in support of their contention, — that in virtue of sundry Royal Charters and Acts of Parliament they "became vested, for the purposes referred to in the foresaid charters and statutes, in, *inter alia*, the right of property in the ground forming the shores and banks of the River *Clyde* between high and low water mark *ex adverso* of what are now the Pursuers' lands;' and they also allege that, under and in virtue of the said royal charters and statutes, they and their predecessors have for greatly more than the prescriptive period possessed and used the said ground as their property. In particular, they allege that they have been in the habit of digging and removing sand, stones, and gravel from the said ground, and that they have also been in the practice of preventing others from removing sand, stones, and gravel therefrom, and have caused parties who removed such material without their authority to be prosecuted; that they have from time to time erected and maintained thereon embankments, dykes and other erections; and that they have also from time to time laid upon the said ground the soil and other material, or part thereof, obtained by them in dredging and widening the channel of the river.

"It will thus be seen that the *Clyde* trustees, like the Pursuers, maintain that they have the property of the foreshores, first in virtue of their titles, and *separately* in virtue of their titles and the possession which has followed thereon. It is therefore necessary to examine with some minuteness the separate grounds on which this claim of property is put forward by the *Clyde* trustees.

"(III.) *The Title of the Clyde Trustees.* — These Defenders (now Appellants) found, in the first instance, upon a charter of King *Charles* I., dated the 16th of October, 1636, in favour of the provost, bailies, dean of guild, treasurer, councillors, and community of the burgh and city of *Glasgow*, which proceeds on many considerations, and, *inter alia*, on the following, viz.: '*Ac intelligentes etiam prepositum ballivos consules et communitatem dicti burgi nostri et civitatis de Glasgew non pauca egregia opera suscepisse magnosque sumptus et impensas hisce multis annis elapsis impendisse reddendo fluvium Glotte* lie river of Clyde, *super quo dicta civitas fundata et situata est pro navibus cimbis et naviculis aliisque vasis ad importandum et exportandum internas et externas commoditates navigabilem summo nostrorum liegiorum solatio ibi habitantium et ad dictas bondas et vice-comitatus eidem proxime adjacentes venientium.*' The charter then

Respondents' titles conferred the right to the property in the foreshore, but reserved their argument on this point until after the

confirms and grants to the burgh and magistrates, *inter alia*, '*etiam libertatem usum et possessionem quam predictus burgus noster de Glasgew et magistratus ejusdem habuerunt eligendi unum ballivum qui aque presit* lie ane water baillie *infra dictum fluvium de Clyde ubi mare fluit et refluit et infra integras bondas ejusdem subtus Pontem de Glasgew ad* lie Clochstane *et corrigendi omnes injurias et enormitates super dicto fluvio commissas infra bondas ejusdem.*' Then there is a grant to the provost, bailies, &c., of '*Totum et integrum dictum burgum nostrum et civitatem de Glasgew cum omnibus et singulis terris domibus edificiis tenementis . . . lacubus torrentibus . . . ripis saxis salmonum piscariis aliisque piscationibus in dicta aqua et fluvio de Clyde . . . una cum omnibus aliis privilegiis et immunitatibus quibuscunque tam ecclesiasticis quam secularibus eisdem spectantibus jacentibus infra predictum burgum libertatem territorium et jurisdictionem ejusdem; ac cum libertate dicti fluvii de Clyd ex utroque latere a Ponte de Glasgew ad* lie Clochestane *nec non cum libertate et immunitate navium stationum* lie of the readis of Inschegreine, Newwark, Pot of the rig *vel alicujus alterius navium stationis infra dictum fluvium de Clyde inter Pontem de Glasgew* et lie Clochstane *predictum pro onerando et exonerando mercimonia et bona ad dictum burgum*,' &c. Then follows a new erection of the burgh '*in unum liberum burgum regalem cum omnibus et singulis libertatibus privilegiis immunitatibus et jurisdictionibus que de juribus et regni nostri consuetudine pertinuerunt pertinent aut juste pertinere poterint ad aliquem liberum burgum regalem.*' And then follows the following grant, upon which a considerable part of the argument for the *Glasgow* trustees was founded :—'*Damus et concedimus liberam potestatem libertatem et privilegium prefato nostro burgo de Glasgew burgensibus et inhabitantibus ejusdem negociandi* to lie tred et traffique *vendendi et mercimonia faciendi infra omnes partes dicti fluvii et aque de Clyde cum extraneis omnibusque aliisque personis ibidem venientibus et reparantibus et edificandi portus et navium stationes propugnacula et* lie gittieheidis *ad reddendum dictum fluvium magis navigabilem infra integras bondas dicti fluvii a dicte Ponte de Glasyew ad lie Clochstane et ad recipiendum eorum naves cymbas et naviculas infra bondas dicti fluvii in quantum estus maximus* lie spring-tyde *fluit; et capiendum lapides et arenam infra aliquam partem dicti fluvii in quantum dictus estus maximus fluit, ad construendum propugnacula portus navium stationes et* lie gittieheidis *et ad reparandum et emendandum eadem et cum eisdem naves suas cymbas, naviculas aliaque vasa saburrandum; una etiam cum potestate et privilegio ipsis exigendi, petendi et levandi anchoragia et* lie schoir silver *aliasque devorias omnium mercimoniorum cymbarum navicularum aliorumque vasorum appellentium apud lie Broomie Law de Glasgew vel ad aliquam aliam partem infra dictum fluvium de Clyd secundum usum et consuetudinem.*'

"The *Clyde* trustees maintain that, in virtue of this charter, the property of the banks and shores of the *Clyde*, from the bridge of *Glasgow* to the *Clochstane*, which are respectively far above and below the limits of the Pursuers' land, was conveyed to the

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Respondents had been heard. On the question of fact, they contended that the necessary acts of possession for forty years over

provost and magistrates of *Glasgow*, and that they, the *Clyde* trustees, have now vested in them all the rights conferred by that charter upon the magistrates. As to the interpretation of the charter, I am of opinion that the right of property on the shores and banks was not thereby conferred on the magistrates. The right of appointing a magistrate, called a water bailie, to prevent disorders taking place in the river, was undoubtedly conferred on the magistrates. Power also was given to them to maintain and improve the navigation of the river, and for that purpose to take sand and stones from any part of the river and to make bulwarks and jetty-heads, &c. They were also authorized to ballast their own vessels with material taken from the river, and to levy tolls on all ships using the river, and on goods exported and imported from or into the bounds in question. But the grant of such powers and privileges as these does not necessarily or naturally imply a grant of property in the foreshores. It is, in my opinion, nothing more than a grant of authority to the provost and magistrates of *Glasgow* to perform, for the purposes of navigation, all such acts upon the shores and banks of the river as the Crown itself might have done for similar purposes, and it merely constitutes a burden on the right of property in the foreshore to whomsoever these may belong. It may be that the Crown, though trustee for these public uses, might not have been bound to perform any such operations for the maintenance or improvement of the navigation, but it undoubtedly had power to do so; and even an express grant of the foreshore to an individual must always have been subject to a reservation—implied, if not expressed—of the right of the Crown, as trustee for the public, to maintain and regulate the navigation. And I do not think that it was incompetent for the Crown to delegate these powers to the burgh of *Glasgow*, as being deeply interested in the river.

"But it is to be observed that this power of taking sand and stone from the river—unlike all the other subjects and privileges conferred by the charter—is given, not to the provost, bailies, and council of the burgh at all, but to the burgh itself, and the burgesses and inhabitants thereof, as part of a general clause conferring upon these burgesses and inhabitants power, liberty, and privilege of trading in every part of the river and water of *Clyde*. Even, therefore, if the power and privileges of this charter were all transferred from the provost and magistrates to the *Clyde* trustees, I do not think that any right of property, either in the *alveus* of the *Clyde* or in the foreshores thereof, was by that charter conferred upon the provost and magistrates, or was capable of transmission to the *Clyde* trustees. But further, I am of opinion that the *Clyde* trustees have failed to connect themselves in any way with that charter. They derive their existence solely from statutes which do not confer upon them any right to that charter. In either view of the case, therefore, it follows that the performance of any of the operations, or the exercise of any of the powers authorized or conferred upon the burgh of *Glasgow* by the charter in question, even if regularly carried on from 1636 to the present date, could not have the effect of giving to that community, or to the *Clyde* trus-

the foreshores to give the property coupled with the titles, as against the Crown, had not been exercised, or proved. Their argument and the evidence adduced on this point sufficiently appears

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tees, any right of property in the foreshores, or any higher right than the maintenance and protection of the public navigation; and, in particular, could not have the effect either of divesting the Crown of its radical right of property in the foreshore, or of interfering with any right to the foreshore conferred by the Crown upon the proprietor of the adjoining lands. And, accordingly, in the debate upon the proof, the counsel for the Lord Advocate expressly stated, in answer to a question put by myself, that the Crown held that no right of property in the foreshore has ever been vested in the provost and magistrates of *Glasgow* or in the *Clyde* trustees, either under the said charter or in any other way. On this branch of the case, therefore, I am of opinion (1) that the charter in question is not of itself a title to the property of the foreshores; and (2) that even if full possession had been enjoyed by the grantees of that charter and their successors, by the performance of all the operations authorized, and the exercise of all the powers conferred by it, the title is not one which, by such possession, could be explained to be, or converted into, a title of property. In short, the charter, so far as it may relate to the foreshores, was a mere grant of a power or faculty to perform certain operations on lands belonging to the Crown, or to a grantee of the Crown, for the maintenance and improvement of public navigation, and is something entirely different from a grant of lands which, by prescriptive possession of certain other lands not specified in the grant, but as parts or pertinents of the lands named, is held to have been intended to include these unnamed lands as well as those expressly mentioned.

"The charter of 1636 being thus of little avail to the *Clyde* trustees in the present question, it is necessary to examine their alleged statutory title to the foreshore of the *Clyde*. The history of the legislation begins with the Act 32 Geo. 2, c. 62 (1758), which conferred upon the magistrates and council of the City of *Glasgow* power to deepen and improve the *Clyde* from *Dumbuck Ford* (which is at the western extremity of Lord *Blantyre's* property) up to *Glasgow Bridge*, and to perform all necessary acts in and upon the bed and banks of the river for that purpose.

"For the precise terms of the statute reference is made to the Act itself; but I may specially notice the 2nd and 37th sections, which provide that the magistrates and council may open stone quarries and dig stones or other materials out of any waste or common ground lying near the said navigation, without paying anything for the same —they always filling up and levelling all holes or pits which should be thereby made; and in case sufficient materials could not be found in such waste or common ground, then it should be lawful for the magistrates and council to dig and gather such materials in, and carry the same out of, the grounds of any person or persons near the said navigation works (not being the ground whereon any houses stand, or garden, orchard, yard, planted walk or walks, or avenue to a house), where such materials could be found for effecting the purposes aforesaid, and for keeping the works in order and repair, the

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from the opinions of the Law Peers (1). [They commented on, *Agnew* v. *Lord Advocate* (2); *Attorney-General* v. *Chambers* (3);

magistrates and council making reasonable satisfaction to the owners in the manner pointed out by the statute. Now it is very probable that, under the terms 'waste or common ground,' may be included the foreshores of the river, which, undoubtedly, are to a very considerable extent covered with stones, sand, or gravel and mud, and which, therefore, may properly be called waste ground. But the power to take away stones and gravel therefrom, without paying anything for the same, does not confer upon the magistrates and council any right of property in the foreshore. Such a power would have been entirely unnecessary if the foreshores had been already conveyed to them by the charter of 1636; and the whole language of the statute seems to imply that all the operations contemplated, whether *in alveo* or in the shores and banks, were to be performed on the property of others, whether of the Crown or of subject proprietors, who were to be entitled to receive compensation except where the grounds were waste, in which case no compensation was to be claimable. I therefore think that the powers given to the magistrates and council, under this statute at all events, could not interfere with the right of property on the foreshore, whether vested in the Crown or a subject, and was merely a burden imposed upon the proprietor not only of the foreshore but also of the adjacent dry land, of submitting to some little inconvenience for the general public good.

"The Act of *George* II. was followed by other statutes conferring further and additional powers on the magistrates and council of *Glasgow*, for the purpose of improving and maintaining the navigation of the *Clyde*. It is unnecessary to specify the details of these statutes, because the powers conferred are substantially of the same kind as, though more extensive than, the powers conferred by the original Act. The statutes referred to are—10 Geo. 3, c. 104 (1770); 49 Geo. 3, c. 74 (1809). It is only necessary to say that in all of these Acts the rights of the proprietors of lands affected by any of the operations authorized are fully protected, the trustees being authorized to take or acquire land, or to execute works thereon, only on condition of making compensation for all ground taken or injured by them in the performance of their statutory duties.

"The next Act, 6 Geo. 4, c. 117 (1825), is an important one—(1). Because it for the first time associates with the magistrates and council persons not belonging to that body, as trustees for carrying into effect the purposes of the various statutes; and (2). Because it contains important restrictions upon the powers of the trustees as to executing works on the south side of the river, along the lands and estate of *Erskine*, from *Erskine Ferry* down to a point opposite *Friskyhall*. Sect. 4 provides that no works whatever are to be executed upon the banks at that part of the river without the consent in writing of the proprietor of these lands, so that even under their compulsory powers the trustees could not take any part of the foreshores at this part of the river. The claims of Lord

(1) *Post*, p. 785. (2) Court Sess. Cas. 3rd Series, vol. xi. pp. 309, 324.
(3) 4 De G. & J. 55; 4 D. M. & G. 206.

Corporation of Hastings v. *Ivall* (1); *Stair*, 2, 1, 5; 2, 3, 60; *Erskine*, 2, 6, 17; *Bell's* Prins. ss. 641–2; *Craig's* Feudal Rights,

Blantyre, and of all the other proprietors adjacent to the river, for compensation for ground taken, or for damage done, were fully protected by this Act.

"The next Act, 3 & 4 Vict. c. 118 (1840), is also of some importance. By it an entirely new body of trustees is entrusted with the execution of the *Clyde* Acts. The trustees consist of fifteen members of the town council and other ten persons not members of that body, and they are authorized, for the purposes of the Acts, and of the operations thereby sanctioned, 'to enter upon, take, occupy, and use the several respective lands, tenements, or other heritages, upon, through, or adjoining to which the same are intended to be made, carried, executed, or constructed within the boundaries or line of works delineated on the said map or plan, or within the limits of the aftermentioned deviation, indemnification being always made to the owners, lessees, and occupiers of such lands, tenements, or other heritages, in manner hereinafter provided, reserving always to the proprietors of lands adjacent to the said river all rights to soil or ground reserved to them by the said recited Acts, or this Act, or other rights competent to them at common law, except in so far as the same may be affected by the provisions of this Act.' In the notices which were served before the Act was obtained, and in the schedule appended to the Act, Lord *Blantyre* is designed as owner or reputed owner of the foreshore; and in the 45th section it is expressly enacted, with reference to the river opposite to Lord *Blantyre's* estate on the south side of the river, that as some of the provisions of the previous Acts as to works on the channel, or on the banks of the river opposite to or along the lands of *Erskine*, were or might be held inconsistent with or restrictive of the powers or authorities now granted, the said provisions of the previous Acts were repealed, and in lieu thereof it was provided that in executing the works along or opposite Lord *Blantyre's* property on the south side of the river, from *Erskine Ferry* westwards to the cross dyke opposite *Friskyhall*, no embankment or dyke should, without previous leave in writing from Lord *Blantyre*, or the proprietor of the estate for the time, be higher or of a greater height than the level therein specified; the power of the trustees to make jetties and dykes was taken away, except to a limited extent; all deviation of any kind from the lines laid down on the parliamentary plan was prohibited without the proprietor's written consent; and it was expressly provided, 'that it shall not be lawful for, nor in the power of, the said trustees to deposit any earth, soil, or other matter, raised, excavated, or dredged from the bed or channel of the said river, upon any land beyond or out of the channel, as hereby authorized to be formed within the space where Lord *Blantyre's* property adjoins the river, without leave in writing to that effect first had and obtained for such purposes from Lord *Blantyre* or his foresaids.' Various other provisions are made as to boat access for the convenience of Lord

(1) Law Rep. 19 Eq. 558.

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bk. 1, ch. 14, Dieg. 4; Charter to Burgh of *Glasgow*, 1636 (1); 32 Geo. 2, c. 62 (1758); 10 Geo. 3, c. 104 (1769); 49 Geo. 3, c. 74

Blantyre's property on both sides of the river, and for protection of his ferries. The compulsory powers of the Acts could therefore not be employed by the trustees so far as that part of the estate of *Erskine* was concerned, and as regards the remainder of the estate, ground taken or injured must be paid for by the trustees.

"It is only necessary to add that, by sect. 124, it is provided that nothing in that or any previous Acts should in any way prejudice the estate, right, title or interest of the Crown in the waterway, alveus or channel of the *Clyde*, or over any land, ground, or heritages then or previously forming or constituting part of the waterway, alveus, channel, or reclaimed or resumed, or to be reclaimed or resumed, by means of the works, matters, or things done, or to be done or performed, by the trustees in execution of and under the authority of the previous Acts or of the said Act. From the terms of this statute of 1840, it is plain that no right of property in the foreshore was conferred upon or recognised as existing in the *Clyde* trustees. On the contrary, if any right is recognised at all, it is the right of Lord *Blantyre*. Without attaching too much importance to the schedule of owners and occupiers appended to the Act, it is a somewhat significant fact, that whereas Lord *Blantyre* is entered in that schedule as the proprietor or reputed proprietor of the foreshores in question, neither the *Clyde* trustees nor the Lord Provost and magistrates of *Glasgow* were considered as possessing or even as claiming any right of property or interest of any kind in these foreshores, although they are repeatedly entered in the schedule as owners or reputed owners and occupiers of various other subjects scheduled, some of them being described as 'part of the river bank lying open and waste.' Now, whatever the right of the Crown might have been, it is plain that, at all events prior to the date of this statute, neither the *Clyde* trustees nor the City of *Glasgow* had acquired any right to the property of these foreshores, and it is equally clear that no such right was conferred upon either of these bodies by this statute. On the contrary, if any inference whatever is to be drawn from the language of this statute as to the property of the foreshore, it is, that the property was regarded as belonging to Lord *Blantyre*.

"The whole of these statutes were repealed and consolidated by *The Clyde Navigation Consolidation Act* (1858), by which the management of the navigation was committed to a new body of trustees, twenty-five in number, who are declared to be a body corporate, consisting of the Lord Provost of *Glasgow*, and other nine members of the town-council, and of other fifteen persons, representatives of the shipping, mercantile, and trading interests of *Glasgow*. By this Act the whole undertaking, lands, tenements, works, plant, stock, goods, debts, money, and other property and effects whatsoever, heritable and moveable, real and personal, belonging or owing to or held by the former *Clyde* trustees, subject to the existing debts, liabilities, engagements, contracts, obligations, statutory

(1) See Lord *Curriehill's* note, *ante*, p. 776.

(1809); 6 Geo. 4, c. 117 (1825); 3 & 4 Vict. c. 118 (1840); 21 & 22 Vict. c. 149 (1858): see also *Graham* v. *Peat* (1); *Scrabster Harbour Trustees* (2); *Baillie* v. *Hay* (3).

proceedings, and incumbrances affecting the same, was transferred to and vested in the new trustees. The statute substantially re-enacts the provisions of the previous Acts, so far as still applicable, and confers on the trustees powers and privileges similar to those conferred on their predecessors. And the rights of all landowners are fully protected—the 45th and other clauses of the Act of 1840 in favour of the proprietor of the estate of *Erskine* being *verbatim* re-enacted; and in sect. 77, which requires the trustees to obtain the written consent of the Crown to the construction of certain works below the line of high-water mark, it is expressly provided 'that if the right of property of or on the shore shall legally belong to any person, such right shall not be prejudiced except so far as power to purchase the same is given by the recited Act and this Act.' This statute, therefore, like the previous Acts, leaves the question of the property of the foreshore very much as before, with this material qualification, that it distinctly recognises the fact that these shores may, to at least some extent, be found to belong to private individuals. But certainly there is nothing in this or in any of the prior statutes to countenance the claim of the *Clyde* trustees to the property of the foreshore, unless in so far as they may have purchased the same from the proprietors by voluntary agreement, or under their compulsory powers. For the rules according to which such statutes are to be construed, reference may be made to the case of *Milne-Home* v. *Allan* (Court of Sess. Cas. 3rd Series, vol. vi. p. 189).

"(IV.) *Alleged Acts of Possession by the Clyde Trustees.*—But although the Lord Advocate maintains that the property of the foreshores has not been vested in the *Clyde* trustees, but remains still with the Crown, both sets of Defenders maintain that the possession which the *Clyde* trustees have had of the foreshores of the Pursuers' lands has rendered the possession of the Pursuers and their predecessors a divided possession, and has deprived it of the exclusive character which is essential to explain their titles, as including a grant of the foreshores. And as the Lord Advocate maintains that the possession of the foreshores has been virtually delegated to the *Clyde* trustees by Parliament with the consent of the Crown, it may be desirable to examine in what the alleged acts of possession consist, although, as I have already said, I do not think that the operations authorized by any of the statutes, if carried out in terms of these Acts, can be held to be inconsistent with the right of property being vested in the Pursuers as fully as the property of any foreshore may be vested in any proprietor of lands adjoining a navigable river. The power to take stones from waste ground without compensation is merely a statutory burden imposed upon all proprietors of waste ground, whether foreshores or

(1) 1 East, 244.

(2) Court Sess. Cas. 3rd Series, vol. ii. p. 884.

(3) Court Sess. Cas. 3rd Series, vol. iv. p. 625.

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Mr. *Herschell*, Q.C., and Mr. *Balfour* (of the Scotch Bar), appeared for the Respondents, but were not called upon to address the House (1).

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dry land, and cannot in any way derogate from the right of property in such waste grounds. But be this as it may, and bearing always in mind that the acts founded on by the Defenders have all been done by the *Clyde* trustees, solely under the powers conferred upon them by the Legislature, for great and beneficial public purposes, let us inquire what these acts have truly been? Now, I can see no evidence whatever that either they or the magistrates of *Glasgow* have ever lifted any materials from the foreshore for any purpose connected with the navigation of the *Clyde*, except, perhaps, some sand for the formation of a bulwark to protect the banks from being washed away by the tide. No doubt there are jetties of some antiquity running across the foreshore into the river bed, but these and most of the other embankments and similar erections made by the trustees appear to have been made not with stones taken from the shore, but with quarried stones. Then the construction of these jetties upon the foreshores does not affect the present question. It is proved that many of the jetties extend beyond the foreshores and above high-water mark and into dry ground admittedly belonging to Lord *Blantyre*. His predecessor having submitted, therefore, to the erection of these jetties upon the foreshore for the improvement of the navigation, can no more deprive him of any right which he may otherwise have had thereto than it can deprive him of his property in the dry land upon which they are partly built. But further, it clearly appears that Lord *Blantyre* and his predecessors had no interest to object to these jetties, but the contrary; because one great effect of them was, besides increasing the scour of the river, and tending to deepen its channel, to create accumulations of silt and soil upon the foreshores, whereby their level was raised and their surface became fitted for cultivation. That this was one great object of the jetties appears very clearly from the report of Mr. *John Golborne*, engineer, to the magistrates as to deepening the *Clyde*, dated the 30th of November, 1768, where he says:—'When the river is confined to a proper breadth by jetties, the intermediate space will be filled up with sand carried down by the spates and the fitts brought up by the tides, and become firm land.' And again, in a report by the same gentleman, dated the 7th of September, 1781, he says:—

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(1) They cited in their printed case, *Bell's* Prins. (s. 2025; Act 1617, c. 13; *Lord Advocate* v. *Maclean* (23 May, 1866; 38 Scottish Jurist, 584). And *Stair*, 2, 1, 5; 2, 3, 60; *Erskine*, 2, 1, 5; 2, 6, 17; 2, 6, 18; *Bell's* Prins. ss. 642, 643, 750, 739. And see also *Innes* v. *Downie* (27 May, 1807; *Hume's* Dec. 552); *Campbell* v. *Brown* (18 Nov. 1813, Fac. Coll. vol. xvii. p. 444); *Boucher* v. *Crawford* (30 Nov. 1814, Fac. Coll. vol. xviii. p. 64); *Macalister* v. *Campbell* (7 Feb. 1837, 15 Shaw, 490); *Paterson* v. *Marquis of Ailsa* (11 March, 1846; 8 D. 752); *Officers of State* v. *Smith* (4 March, 1846, 8 D. 711; 6 Bell's Apps. 487); *Commissioners of Woods and Forests* v. *Gammell* (6 March, 1851; 13 D. 854).

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The Law Peers having taken time to consider their judgment, delivered the following opinions:—

LORD BLACKBURN:—

My Lords, the Respondents sought, against the Lord Advocate as representing the Crown, to have it "found and declared, by

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'It gave me great pleasure and satisfaction to find the general work in such good order and condition, and to observe that the spaces between many of the jetties were filled up and covered with grass, to the great emolument of the proprietors and advantage of the river; for in proportion as the sides fill up and become land, the neap tides will rise higher, and the land floods being more confined, will act with greater force on the bottom, so that by lengthening the jetties in some parts and raising them in others, greater depth may be obtained.' If therefore such was the effect expected and intended by the construction of the jetties, it is not wonderful that the Pursuers' predecessors not only did not object to, but welcomed their construction.

"In course of time, however, it was found that the formation of jetties without connecting walls parallel to the river's banks was not so advantageous to the navigation as had been expected. Connecting walls were accordingly formed under the power of the Act of 1809 already referred to, after reports on the subject by the eminent engineers Mr. *Telford* and Mr. *Rennie*, from which it appears that it was intended and expected that the spaces behind the jetties and the parallel walls would gradually be filled up and become firm land.

"The other operations of the trustees, and of their predecessors the magistrates, appear to have been all directed, not to appropriating and using the foreshore, but rather to the contraction of the channel or navigable bed of the river. This no doubt involved at some places, where the channel required straightening, the cutting away of some parts of the foreshore; but all such encroachments were, by the statutes which conferred the power to encroach, directed to be paid for to the proprietors.

"But it is said that, although in point of fact under the Acts of 1840 and 1858, various parts of the foreshores of the Pursuers' lands within the statutory lines laid down on the parliamentary plans have been dredged or cut away by the trustees, compensation has never been demanded by Lord *Blantyre*. I do not think that this is a circumstance of the slightest consequence. His Lordship, no doubt, had been scheduled as owner of the foreshores, and he might have claimed compensation, but it was *res meræ facultatis* in him to make the claim; and he probably was satisfied that the damage, if any, was so trivial, that it was not worth his while to claim compensation. But, in truth, it is evident from a long correspondence which took place between the Lord Provost of *Glasgow* and the engineers of the late and present Lord *Blantyre*, and the guardians of the latter during his minority, that the magistrates and council, while acting as trustees of the *Clyde* navigation, expressly recognised the right of Lord *Blantyre*, as proprietor of these foreshores, to the property of all accessions thereto which might be the result of

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decree of the Lords of our Council and Session, that the ground forming the shores and banks of the River *Clyde*, between high-water mark and low-water mark, and the whole sand and gravel contained therein, are the property of the Pursuers, and that the Defenders have no right to the same, and ordaining the Defenders to desist from taking sand and gravel from the said ground, and from interfering with the Pursuers' possession thereof, and finding the Defenders liable in expenses.

"The Defenders appealed against this decree, and the Pursuers cross-appealed against so much of the decree as found the Defenders entitled to the accumulation of soil caused by the operations of the trustees.

"But the *Clyde* trustees maintain that they have used the foreshores of the Pursuers' land to the exclusion of the Pursuers by depositing thereon materials dredged from the river. The Pursuers' answer is, I think, conclusive, viz., that such deposits have all been made with the consent of Lord *Blantyre* and his predecessors, and could not have been made without such consent. In many cases Lord *Blantyre* and the *Clyde* trustees have made the deposit a joint act—the trustees depositing dredgings, and Lord *Blantyre* depositing rubbish and soil on the top of the elevated surface for the purpose and with the effect of making it available for pasture. But all this only shews that the acts of the trustees not only did not interfere with Lord *Blantyre's* possession of the foreshores or amount to joint possession, but was done with the express consent, and indeed at the request of, Lord *Blantyre*, for the improvement of his property, and could not have been done by the trustees upon any other footing. Indeed, in some instances in which the trustees asked in writing for Lord *Blantyre's* consent to their depositing dredgings upon the shores, they expressly describe the ground as being 'Lord *Blantyre's* foreshore,' or 'your Lordship's foreshore.'

"The trustees further allege that they have prevented and even interdicted persons from taking sand from the foreshores. This is quite true; but it was done at the request of Lord *Blantyre* himself, who desired to be saved the expenses of such prosecutions himself, and who requested the trustees to put in force their statutory powers to prevent any interference by unauthorized persons with the banks of the river, and particularly with sand, which at Lord *Blantyre's* request they had deposited upon the shores and banks.

"It is in vain, therefore, for the Defenders to maintain that any acts done by the *Clyde* trustees during the last 100 years upon these foreshores have been of such a character as to prevent the possession which Lord *Blantyre* and his predecessors are proved to have exercised for time immemorial from having the character of exclusive possession as proprietors. And on this branch of the case I am of opinion, not only that the Defenders have failed to prove any acts of possession inconsistent with the full right of property being in Lord *Blantyre*, but that the Pursuers have succeeded in proving acts of possession of a character and extending over a length of time sufficient to establish in them the property of the foreshores of the *Clyde ex adverso* of all their lands on both sides of that river, as belonging to them in property as pertinents of these lands under their titles thereto. It may be the case that no positive acts of possession have been exercised by Lord *Blantyre* and his predecessors upon every yard of shore fronting the river, but on ground of such extent it is obvious that minute proof of such possession could not be expected. I think the proof establishes that Lord *Blantyre* has substantially possessed the whole foreshores as his own property from time immemorial.

"The result is, that decree of declarator will be pronounced in favour of the Pursuers in respect of the possession following on their titles, both sets of Defenders being found liable in expenses. Of course, however, the decree

water mark and low-water mark, including the space between high-water mark and the longitudinal walls or dykes which have been erected along or near to certain parts of the deepened channel of the said river, *ex adverso* of the estates of *Erskine*, *Bishopton*, and *Northbar*, in the county of *Renfrew*, and *ex adverso* of *Kilpatrick* and *Dalnottar*, and of *Shorepark* and *Glenarbuck*, in the county of *Dumbarton*, belonging to the Pursuers, belongs in property to the Pursuers, and is part and pertinent of the adjoining lands, but subject always to any rights of navigation or other rights which the public may have over the same, and subject also to any rights conferred upon the trustees of the *Clyde Navigation* by their Acts of Parliament." The River *Clyde* trustees were added as Defenders (1).

The pleas in law for the Pursuers, the Respondents, were two:

1. The shores and banks of the River *Clyde*, *ex adverso* of the lands and baronies libelled being the property of the Pursuers by virtue of their titles, subject to the right of the Crown as trustee for public uses, the Pursuers are entitled to decree in terms of the conclusion of the summons.
2. *Separatim.* The shores and banks libelled having been for time immemorial, or at least for forty years, possessed as their property by the Pursuers and their predecessors, they are entitled to decree as concluded for.

The Lord Advocate and the *Clyde* trustees by their pleas in law traversed both of the pleas in law of the Pursuers.

A great deal of evidence was led for the Pursuers, the Respondents, and some on behalf of the *Clyde* trustees. None was led by the Lord Advocate.

The interlocutor of the Lord Ordinary (Lord *Curriehill*), dated

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will be qualified, in terms of the conclusion of the summons, by being given subject to the rights of the public as well as of the *Clyde* trustees under their various statutes.

"In conclusion, I have only to state that some evidence was produced by the *Clyde* trustees for the purpose of shewing that, according to modern engineering notions, reclamation of the foreshores by raising their levels is a mistake, and instead of being an advantage to the navigation will tend to diminish the flow of tidal water. That, however, is a question which does not arise in the present case. The Pursuers do not ask in the present summons to have it found that they are entitled to reclaim the foreshore; but if they are proprietors of the foreshores they will be entitled to perform any operations upon them which will not interfere with the statutory rights of the *Clyde* trustees."

(1) Jan. 15, 1876; Scot. Law Rep vol. xiii. p. 213.

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the 18th of July, 1876, is appealed from. It is in the following words:

The Lord Ordinary, having heard the counsel for the parties, and considered the closed record, proof, and whole process, finds that the Pursuers, in virtue of their titles to the lands libelled, and of the possession by the Pursuers, and their predecessors and authors, under and in virtue of said titles for upwards of forty years before the commencement of the action, or from time immemorial, are proprietors of the foreshores of the River *Clyde, ex adverso* of said lands, but subject always to any rights of navigation or other rights which the public may have over the same, and subject also to any rights conferred upon the trustees of the *Clyde Navigation* by their Acts of Parliament: Therefore finds, decerns, and declares in terms of the conclusions of the summons: Finds the Defenders, and the trustees of the *Clyde Navigation*, who have compeared as Defenders, liable in expenses to the Pursuers; appoints an account thereof to be lodged, and remits the same to the auditor to tax and to report.

Two interlocutors of the First Division of the Court of Session, dated respectively the 19th of December, 1877, and the 21st of February, 1878, are also appealed from. They are in the following words:—

Edinburgh, 19th December, 1877.—The Lords having resumed consideration of the cause, with the additional proof taken by Lord *Mure*, and heard counsel thereon, and on the reclaiming note for the trustees of the *Clyde Navigation* and another against Lord *Curriehill's* interlocutor dated 18th of July, 1876, adhere to the said interlocutor and refuse the reclaiming note: Find the Defender and the trustees of the *Clyde Navigation* liable in additional expenses, excepting therefrom the expenses occasioned by the allowance of additional proof: Allows an account of said expenses to be given in; and remits the same, when lodged to the auditor to tax and report.

Edinburgh, 21st February, 1878.—The Lords approve of the auditor's report on the account of expenses incurred by the Pursuers, and decern against the Defender, the Lord Advocate, and the trustees of the *Clyde Navigation* for payment to the Pursuers of the sum of £526 12*s.* 9*d.* of taxed expenses.

The Lord Ordinary, in the note explanatory of the grounds of his judgment, entered very fully into the whole law on the subject and discussed at length and with great care the effect of the evidence led before him (1).

It was contended by the Appellants before the First Division that the small property of *Glenarbuck*, being held by a different title from the barony of *Erskine*, the possession for forty years *ex adverso* of it was not proved by that which went to prove possession *ex adverso* of the barony; and that, on taking the evidence before the Lord Ordinary, the evidence bearing on the one had not been

(1) *Ante*, p. 772.

sufficiently discriminated from the evidence bearing on the other. The Lords of Session therefore allowed the Pursuers to lead additional evidence of the possession of the foreshore *ex adverso* of the lands of *Glenarbuck* by themselves and their predecessors, and to the Defenders a conjunct probation. Additional evidence was led before Lord *Mure* both by the Pursuers and by the *Clyde* trustees; and after this had been heard the second interlocutor appealed against was pronounced.

Lord *Mure* delivered an elaborate opinion, in which Lord *Deas*, Lord *Shand*, and the Lord President briefly expressed their concurrence.

Lord *Mure* said:

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In dealing with such cases there are, as it appears to me, certain propositions in law which may now be assumed to be settled. The first is, that property in the foreshore is capable of being transferred by the Crown to a private proprietor. Secondly, that such property can only be alienated by the Crown, subject to and under reservation of any rights of navigation, or other rights, which the Crown, as representing the public, may have over it. Thirdly, that a Crown title, and more especially a barony title to property along the sea-shore or a tidal navigable river, when followed by possession of the foreshore, is sufficient to constitute a valid right of property in the foreshore, although the title does not contain any express grant of the shore, or any such specific and definite boundary as is by itself sufficient to instruct that the shore was intended to be conveyed. As to these three propositions I do not understand that there is any dispute between the parties. But there is another important question relative to such rights which has been raised, and as to which parties are directly at issue, viz., whether a barony title to property which does not contain an express grant of foreshore, or any such specific boundary as can be held to include the foreshore, is of itself and without any proof of possession sufficient to confer that right.

The Lord Ordinary has stated in the note to his interlocutor that, in the view he takes of the present case, it is unnecessary to pronounce any formal judgment on this question as to the effect of a barony title; but as it appears that the parties were desirous that an opinion should be expressed upon the point, his Lordship has indicated his opinion that the question is practically settled in so far as this Court is concerned by the decision in the case of *Agnew* v. *The Lord Advocate* (1), and in that judgment I understand his Lordship to concur. I agree with the Lord Ordinary in thinking that the decision of this question is not necessary for the disposal of the present case; but, as it has been argued, more especially with reference to that portion of the Pursuer's property called *Glenarbuck*, which was acquired by him in the year 1845, it may be right that I should state that, as at present advised, I should be disposed to hold that the judgment in the case of *Agnew* proceeds upon a sound view of the law applicable to that important question. I do not think it necessary to state at any length the

(1) Jan. 20, 1873; Court Sess. Cas. 3rd Series, vol. xi. p. 309.

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reasons which lead me to come to that conclusion. There have, no doubt, been contradictory opinions upon that question by eminent Judges; but I think that the result which the Second Division came to in the case of *Agnew*, upon an examination of all the authorities, was very shortly and distinctly expressed by Lord *Benholme* in his opinion, when he said that "where an estate in on the sea-shore, and held by titles which do not by express grant or specific boundary extend the right of the proprietor beyond high-water mark, there is no presumption that the foreshore is a pertinent of the land." The question, therefore, which we have now to dispose of is, Whether Lord *Blantyre's* title, taken in connection with the proof of possession which has been had of the foreshore, is sufficient to entitle him to decree in terms of the conclusions of the summons?

My Lords, the Lord Advocate at your Lordships' Bar pointed out that the decision against the Crown proceeded on the second plea in law; and that he had no case on appeal unless he could get rid of that decision. The Respondents have in their case entered into an elaborate argument to shew that their first plea in law was good. That the Lord Advocate denied, but he proposed to reserve what he had to say on that point till the reply, if it became necessary to decide that question. This course was approved of. The Lord Advocate further admitted that he was not prepared to deny that the three propositions stated by Lord *Mure* in the passage just read were accurate statements of the law of *Scotland*, and consequently that the question was, as stated by Lord *Mure*, whether Lord *Blantyre's* title, taken in connection with the proof of possession which has been had of the foreshore, is sufficient to entitle him to decree in the terms of the conclusion of the summons.

The Lord Advocate and Mr. *Marten* were accordingly heard on this part of the case, and urged all, I believe, that could be urged on behalf of their clients. At the conclusion of their argument your Lordships adjourned the further hearing of the appeal in order that you might determine whether it was necessary to hear the counsel for the Respondents.

Your Lordships have the elaborate and very able opinions of Lord *Curriehill* (1),—before whom one part of the oral evidence was heard,—and of Lord *Mure* (2), before whom the rest of the oral evidence was heard. Both of those learned persons agree in the result; and the other Lords of Session have agreed with them unanimously. My Lords, it is not a light thing to draw from the

(1) *Ante*, p. 772. (2) See *ante*, p. 789.

written notes of evidence a conclusion differing from that which was come to by those who heard the evidence given. If I did so it would be with doubt and diffidence; and I should not express such an opinion without much consideration and what seemed to me to be strong reasons. But in this case, after having carefully listened to all that was said at your Lordships' Bar, and after having for myself examined the evidence, I must say, speaking for myself alone, that not only should I have come to the same conclusion as the Lords below, but that I should have found difficulty in affirming a contrary finding if it had been come to by them. I think that, if the burden of proof lay upon the Respondents to prove possession of the foreshore for forty years, they have done so. I do not propose to enter into a detailed examination of the evidence. That has been already very fully, and to my mind, very satisfactorily done by Lords *Curriehill* and *Mure*. But I may make a few general observations arising on what was argued at your Lordships' Bar.

The principal question is whether, on the whole, it is proved that Lord *Blantyre* and those who preceded him in the barony of *Erskine* have been for the last forty years in possession of the foreshore lying between the high-water mark and the low-water mark of the *Clyde*, a tidal navigable river *ex adverso* that barony. This is a tract of considerable extent, I think rather more than 700 acres.

Every act shewn to have been done on any part of that tract by the barons or their agents which was not lawful unless the barons were owners of that spot on which it was done is evidence that they were in possession as owners of that spot on which it was done. No one such act is conclusive, and the weight of each act as evidence depends on the circumstances; one very important circumstance as to the weight being, whether the act was such and so done that those who were interested in disputing the ownership would be aware of it. And all that tends to prove possession as owners of parts of the tract tends to prove ownership of the whole tract; provided there is such a common character of locality as would raise a reasonable inference that if the barons possessed one part as owners they possessed the whole, the weight depending on the nature of the tract, what kind of possession could be

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had of it, and what the kind of possession proved was. This is what is very clearly explained by Lord *Wensleydale* (then Baron *Parke*) in *Jones* v. *Williams* (1). And as the weight of evidence depends on rules of common sense, I apprehend that this is as much the law in a Scotch as in an English Court. And the weight of the aggregate of many such pieces of evidence taken together is very much greater than the sum of the weight of each such piece of evidence taken separately.

Now, in the present case, there is a great volume of evidence of almost every kind of act of ownership. Some of them are, if they stood alone, not of great weight. Some are very weighty indeed. That which makes most impression on my mind is that, wherever throughout this whole tract any part of the foreshore has been elevated by the deposit of rubbish or soil so as to be raised above the level of the tide and turned into dry land, the land from which the water has been excluded has been taken possession of by the Barons of *Erskine*. I do not attach so much weight to acts of this sort done recently, one may say almost *post litem motam*, but I attach very much weight to what has been done both before the forty years and during the earlier part of the forty years, during which time everybody, including the *Clyde* trustees, seem to have assumed that the foreshore was the property of the Barons of *Erskine*. It was argued that, as the barons had an unquestionable right as riparian proprietors to have access to the water at high tide, even though the foreshore was still the property of the Crown, the *Clyde* trustees when depositing mud and shingle on the foreshore so as to shut them off from such access, did what, if not authorized by the statutes, would be an injury, if authorized, a matter for which they were entitled to compensation. That is true, but there was nothing to justify the *Clyde* trustees or any one else in making compensation to the barons for this injury by giving them the foreshore if it was the property of the Crown. If it was the property of the barons they were entitled to it, and it is perfectly intelligible that they did not ask for compensation from the *Clyde* trustees for doing that to their land which was really an improvement to it.

I may say that I think any evidence tending to shew that the

(1) 2 M. & W. 326, at p. 331.

Clyde trustees acted as owners of this tract, or of any parts of it, would, in my mind, have been relevant as shewing that they were, and consequently that the Barons of *Erskine* were not in possession, but, as far as I can perceive, every act done by the *Clyde* trustees is attributable to their statutable powers. The same remarks apply to the less important question whether the evidence proves that the owners of *Glenarbuck* have been for forty years in possession as owners of the foreshore *ex adverso* that smaller property.

It is not necessary to form any opinion on the question as to the first plea in law; and as the counsel for the Respondents have not been heard on that question it would be improper to base the decision of this House on any such opinion even if one was formed. The authority of the case of *Agnew* v. *Lord Advocate* (1) is not either increased or shaken by what is now decided if your Lordships take the view of the evidence which I do.

I should therefore propose that your Lordships do not call upon the Respondents and affirm the interlocutors appealed against and dismiss the appeal with costs.

LORD HATHERLEY:—

My Lords, I adhere to the view taken by my noble and learned friend who has addressed the House as to the disposal of this case. The case has been argued with great ability, and at full length before your Lordships' House; but, when looked into, it really reduces itself simply and entirely to a question of fact.

Points of law are glanced at in the pleadings and also in the judgments of the learned Lords of Session who determined this case in the first instance, but they are glanced at to be summarily, and, as I think, justly disposed of by this remark, that supposing that that which might have been at one time a very much contested point, had arisen in this case it would have occasioned no difficulty; the point, namely, as to whether or not one who has had a grant of a barony not defining the exact boundary, and especially the exact river or sea boundary, with regard to the foreshore which forms the fronting portion of the land which he has acquired by the title of the grant of the barony, is obliged,

(1) Jan. 20, 1873; 11 Macph. 309.

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inasmuch as he cannot shew by the charters themselves a definition of his property, to add to the grants contained in those charters a proof of possession of the foreshore in front of his own soil if he claims that foreshore. Whether or not *Agnew's Case* (1) be correctly decided (as to which I cannot say that I entertain much doubt), I apprehend that your Lordships will not in this case be obliged to consider that question, or to deliberate as to that point which was raised and decided in *Agnew's Case* adversely to the owner, namely, that he cannot rest upon his paper title, if I may so call it, without proving possession of that foreshore which he claims in cases where the definition of it is not strictly and clearly contained in the charter itself. In those cases it may be very right and proper that the proof should be required to satisfy the Court, and in order that that which is not *per se* clear should be made clear by the evidence of what has taken place under the title which has been acquired.

If that be so, as the learned Judges in the Court below observed, and as my noble and learned friend who has just addressed your Lordships has observed, it does appear to me really to be made out abundantly clearly in this case that these acts of ownership have been exercised along that portion of the sea shore to which the Respondents on the present occasion have asserted their right. Lord *Curriehill* has gone into the question of title as it appears upon the documents at full length and I shall not repeat his observations. No question has been raised with reference to the description of the property which is conveyed by the several charters. No doubt is raised that by virtue of the several charters Lord *Blantyre* and those who preceded him acquired a title distinctly to a large space of territory, extending a long way down the River *Clyde*, and on each side of that river, a considerable portion of that territory passing under the names of the Barony of *Erskine* principally, and of the Barony of *Glenarbuck*. The sea-shore now in question forms approaches to that land, the title to which has been so acquired by means of grants of those baronies. The proof clearly establishes that.

I have listened to the argument upon the evidence very carefully, and I have very carefully read the evidence, and it appears

(1) Jan. 20, 1873; 11 Macph. 309.

to me that Lord *Curriehill* is perfectly accurate in what he considers to be established by the proof in the cause. He says: "The proof clearly establishes that from time immemorial Lord *Blantyre* and his predecessor have exercised upon the foreshores in question on both sides of the river nearly every conceivable right which an undoubted proprietor could have exercised. They have regularly, themselves or by their tenants, used for pasturing their cattle those portions of the foreshore which though covered at high water produced grass available for pasture." As to that, several witnesses were called, namely, the tenants occupying the lands in a portion of the district, who described the pasturing of their cattle upon the places in question along various parts of the foreshore. Then Lord *Curriehill* says: "They have regularly cut the reeds which grew on the foreshore, and used the same for thatching and other purposes; and, until the supply failed owing to the pollution of the water, they regularly cut the seaweed which grew upon the foreshores, and carried off that ware" (it has been called sea "ware"), "as well as drift ware for the purpose of manuring their lands. They have also carried away large quantities of sand and stones from the foreshore, and used the same for building houses and walls and forming roads upon the estate." (This part I confess, struck me as very forcible evidence of an exercise of the right in question), "and in particular, some thousands of cartloads of sand were taken for the construction of the new mansion-house of *Erskine*, the building of which was begun in 1824 and was not finished until 1835 or later, and for the formation of an approach to the new house. During the same period also, the rubbish and *débris* from the foundation of the new mansion-house and from the ruins of the old, were deposited in large quantities upon the foreshores of the policy grounds, and upon that great quantities of sand and soil dredged from the bed of the river have been at the request of or with the permission of Lord *Blantyre* and his predecessors deposited on the foreshores, whereby the surface has been elevated above the level of high water, and has long been used as an addition to the arable or grazing ground of the estate. Similar operations have from time to time been performed on other parts of the foreshore on both sides of the river, whereby a considerable extent of ground has

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been reclaimed." I need not read any further. What I have read is quite enough to shew what in the opinion of Lord *Curriehill* was the result of the evidence.

Now the Court below have been unanimous in their view of this evidence, and in particular Lord *Mure*, whose name has already been mentioned, has taken the same view as Lord *Curriehill*, going into some detail, but not quite to the same extent as Lord *Curriehill* has done. And there is one observation which I shall presently make with reference to the *Clyde* trustees which struck my mind as having some strength with regard to this evidence.

The corporation of the *Clyde* trustees are setting up rights under their Act of Parliament upon the foreshore which they say they have exercised; and they say, further, that they have interfered with other persons exercising rights which they thought hostile to the rights exercised or exerciseable by them. The answer to that on the part of the Respondents has been, True it may be that you have exercised rights upon the foreshore, and indeed upon part of our foreshore (if I may so express it on behalf of the Respondents), but you have done nothing which you were not authorized to do by your Act of Parliament; your Act of Parliament may well have authorized those acts, and indeed the nature of the Act itself, the object of which was to improve the navigation of the *Clyde*, almost required that you should be furnished with very considerable powers adversely to the proprietors of land, who either were heard when the Act was before Parliament, or, if they were not so heard, thought that it was not necessary to interfere with the rights and powers which were being granted to the *Clyde* trustees.

But Lord *Curriehill* goes on to say—I do not quote his words, I merely state the effect and purport of his reasoning—that as regards the Crown itself the Crown would not make a grant, and ought not to make a grant, of land except, subject to the rights vested in the Crown, to protect the river as trustee for the public in maintaining the navigation. The rights granted by Parliament would only be granted in the same way, and if the Acts of the *Clyde* trustees and the clauses granting powers to those trustees be carefully scanned (they are elaborately set forth in Lord

Curriehill's judgment) it will be seen that no right in the soil itself, no right of the soil, no possessory right, is granted except for the purposes of the Act, we find that there are a considerable number of powers granted materially interfering with the rights of proprietors as regards their own property as far as the protection of the river goes, but they are confined entirely to that particular purpose. I do not find that it is alleged in any portion of the documents before your Lordships, nor do I find in the evidence anything that proves that Parliament interfered with or forbade the Respondents from exercising the rights which they claim adversely to the *Clyde* trustees; I mean adversely in this sense, as being the owners and proprietors of the land in question, and as being entitled to rights, not to co-equal rights, that would be absurd, but to rights with them in the property. It was made subject to such powers and authority as would be necessary for the general purpose of the Act, which general purpose was the improvement of the River *Clyde*, and so far as powers of interference were required for the purpose of improving the river they were granted; so far, and so far only, has Parliament interfered.

But there was another point which struck me, I confess, all through. The River *Clyde* Acts, and the rights and powers of the trustees and the modes in which they have exercised them, are all very strongly corroborative of the view that the Respondent has acted within his rights in those things which he has done, because this is not a mere ordinary case of a person exercising rights in a property which perhaps may not interest a great number of people around him so as to induce them to interfere with the exercise of those rights. Part of the argument which has been addressed to us is that hardly anything has been done by Lord *Blantyre* which might not have been done without disturbing the repose and comfort of his neighbours or interfering with any other right which might call forth the interference of third parties. But, my Lords, here you have a standing body appointed by Act of Parliament, with certain powers to do certain things, some of which might have been done by the Crown, but besides that having certain higher powers granted by Parliament with the sanction of the Crown. They, having those powers conferred upon them, are on the spot, they can notice all that is going on, and they can, if

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they will, step forward to prevent it. They are a body with means and powers of every kind which would have enabled them, if they had thought fit, to interfere with this exercise of these acts of ownership, if I may so call them, on the part of the Respondent and his predecessors. But we do not find any such steps taken by the *Clyde* trustees when that considerable interference with the foreshore was going forward for eleven years, when the Respondent was removing large masses of sand, some thousands of cartloads it is said, from this foreshore itself. That, if anything, was a matter which ought to have called forth, and would have called forth, the interference of the *Clyde* trustees, who were always there and were able to protect themselves and to assert the right, if they had it, to interfere with such acts of ownership. But, my Lords, we find that no such step was taken by them. Those acts of ownership appear to have gone on, the Respondent or his predecessors taking the sea-ware, pasturing their cattle on the foreshore, and taking the sea sand and removing it; all this was done within the cognizance and the jurisdiction of those who had ample means of interfering if they had thought proper to interfere. Nothing, however, was done in the way of interference, and I say that that is very strongly corroborative of the view that those acts of ownership were done in due pursuance of the authority conferred by the grant and the possession thus acquired on the part of the Respondents or their predecessors.

In all cases, where there is such a grant as this, extending for several miles along a river, it is necessary for your Lordships to consider anxiously what the exact nature of the acts of ownership is. Now it is not merely one corner or one field which is shewn to have been used as pasture for the cattle for two or three days, owing to some accidental occurrence, in connection with their going to a fair or the like; such casual exercises of the right are not the matter here in question. There seems to have been a regular exercise on the part of the Respondent of the right of pasturing cattle in the manner described in the evidence just like any other proprietor on his own field; and this was a valuable right. So with the right of taking sea-ware. It appears from the evidence that owing to some alterations which were made in the River *Clyde* some years ago, the stones became nearly bare and

the sea-ware ceased to be collected. But, as I understand the evidence, so long as there was any ware worth collecting it was collected by the tenants of the Respondents. In short, as Lord *Curriehill* says in the judgment which has already been referred to so often, all the rights that possibly could be exercised were exercised by the Respondent, either from time immemorial or for more than forty years, and thereby he fulfilled all the requisites of the *Agnew Case*, should that case ultimately be held, and at present I see no reason why it should not be held, to be sound law. The Respondent, therefore, escapes from the stringency of that case by complying with the conditions which it imposes, namely, by shewing that he had held possession of, as it appears to me, sufficiently large portions of the shore immediately in front of his lands, to justify your Lordships in coming to the conclusion that he is entitled to what he claims. It appears not to have been partial exercise at one particular spot or at one particular time, but a general exercise as often as he or his tenants thought fit of the right to do what they conceived themselves justified in doing by virtue of the title acquired by him.

I confess, my Lords, it appears to me that these acts of ownership justify your Lordships in coming to the conclusion to which the Court below has come. I, for one, should be very loth and very slow to differ from the learned Judges, who had an opportunity of hearing and examining the evidence, and whose decision if we interfered at all in this case we should have to reverse, since the case appears to me to depend upon the facts, by reason of our taking a different view of the facts from that which has been taken by those learned Judges, and taken unanimously, in the Court below. Apart, however, from that consideration, I have come to the same conclusion as to the facts with the most perfect acquiescence in the views which they have presented; and I therefore agree in the motion which has been proposed by my noble and learned friend.

LORD GORDON:—

My Lords, I have had an opportunity of seeing and considering the judgment which has been delivered by my noble and learned friend Lord *Blackburn*, and as I concur in it, and also in the view expressed by my noble and learned friend Lord *Hatherley*, and as

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there is no difference of opinion among your Lordships, I shall express my views in regard to the case very briefly.

Your Lordships have not heard the Appellants on the question raised by the *first* plea in law for the Respondents, viz.: Whether the barony titles possessed by the Respondents are sufficient of themselves, and without any proof of possession, to entitle the Respondents to the decree sought by the present action, and therefore I express no opinion whatever in regard to that plea.

The Court below has dealt with the case under the *second* plea in law urged by the Respondent (1); and the question for decision is well expressed by Lord *Mure* in these words, viz.: "Whether the Pursuer's title, taken in connection with the proof of possession which has been had of the foreshore, is sufficient to entitle him to decree in terms of the conclusions of the summons?"

I have very carefully considered the Respondents' titles, and the evidence of possession of the foreshores in question which has been adduced both on behalf of the Respondents and on behalf of the *Clyde* trustees, and I am of opinion that the Respondents have clearly established the case made by them under their second plea in law. It is not necessary to go into any detail of the titles or of the evidence. Both of these matters have been elaborately dealt with by the Lord Ordinary (Lord *Curriehill*) and by Lord *Mure* in the Court below, and also by my noble and learned friend Lord *Blackburn*, and I concur generally in the views which have been expressed in regard to them. As to the evidence led by the *Clyde* trustees, I am of opinion that the acts proved to have been done by them were all done in exercise of the rights conferred on them by statute, and that these acts do not affect the possession proved to have been had by the Respondents.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 19th June, 1879.

Agents for Appellants: *Walter Murton (Board of Trade) and W. A. Loch.*

Agents for Respondents: *Grahames, Wardlaw, & Currey.*

(1) *Ante*, p. 787.

[HOUSE OF LORDS.]

PHOSPHATE SEWAGE COMPANY, LIMITED, AND THE OFFICIAL LIQUIDATOR THEREOF . . . . . } APPELLANTS;

MOLLESON . . . . . RESPONDENT.

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Res judicata—Competent, and omitted—Scotch Sequestration—19 & 20 *Vict. Bankruptcy (Scotland) Act, c.* 79, *s.* 127.

For the purpose of having a contract of sale of a concession set aside on the ground of fraud, and repayment of the purchase-money, £65,000, with interest, a company filed a bill of complaint in the English Court of Chancery.

At the same time they lodged a claim to be ranked, for the same sum, upon the estates of a firm carrying on business in *Edinburgh* and *London*, which had been sequestrated in *Scotland*. In the claim, the company described the debt as owing under the circumstances set out at length in the bill in Chancery "produced and held as repeated *brevitatis causâ*." To the Chancery suit the trustee of the sequestrated estates was a party. The trustee having rejected the claim, the Lord Ordinary ordered a condescendence and proof. The proof was adduced on the 16th of June, 1874. The Court of Session, and ultimately, this House, held that the claimants were not entitled to the debt claimed against the sequestrated estates; and refused to sist the proceedings in the sequestration, pending the issue of the Chancery suit (1 App. Cas. 780).

The bill in Chancery as filed alleged certain *indicia* of fraud; afterwards additional evidence of fraud was discovered, in time to have it inserted by way of amendment. The bill was finally amended on the 3rd of March, 1874. Subsequently a decree was made by the Vice-Chancellor, and affirmed by the Court of Appeal, rescinding the contract, and ordering repayment of the £65,000; and a declaration was added, that the plaintiff company should be at liberty to prove in the sequestration suit in *Scotland* for the £65,000 (5 Ch. D. 394).

Founding on this decree the company lodged another claim with the trustee in *Scotland*. Again the trustee rejected the claim; and again a condescendence was made up. The company this time put their claim upon the allegations contained in the bill in Chancery as finally amended on the 3rd of March, 1874. The trustee relied on the plea of *res judicata*:—

Held (affirming the decision of the Court below), that the plea of *res judicata* prevailed, because (1) the new allegations of fraud in the amended bill in Chancery did not constitute a new *medium concludendi*; (2) the alleged facts were within the knowledge of the claimants before the proof was adduced in the former action, and might have been inserted by amendment in their closed record in *Scotland*.

Held, also, that no question arose as to the validity, or examinability, of a foreign judgment.

Per EARL CAIRNS, L.C.:—A party who has been unsuccessful cannot be

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allowed to reopen the litigation merely by saying, since the former litigation there is another fact, going exactly in the same direction with the facts stated before, and leading up to the same relief asked for before, but it being in addition to those facts, it ought now to be allowed to be the foundation of a new litigation, and he should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say—I will shew you that this is a fact which entirely changes the aspect of the case, and further I will shew you that it was not and could not by reasonable diligence be obtained by me before.

APPEAL from the First Division of the Court of Session.

This was the third claim made by the Appellants, the *Phosphate Company* with its liquidator, to be ranked upon the sequestrated estates of Messrs. *Peter Lawson* and the individual partners of that firm, for the principal sum of £65,000, with interest, on the ground that they were parties to a fraudulent transaction by which the *Phosphate Company* were deceived into purchasing for that sum a worthless concession of guano, guanito, and phosphate of lime, on the island of *Alto Vela*, belonging to the Republic of *San Domingo*.

The firm of *Lawson & Son* carried on business in *Edinburgh*, and also in *London*. They were adjudicated bankrupts in *Scotland* on the 11th of February, 1873, and the Respondent *J. A. Molleson* was chosen trustee of the sequestrated estates.

In support of the present claim the Appellants produced and founded on a decree obtained in the High Court of Justice Chancery Division, dated the 22nd of March, 1876, in a suit in which the Appellants were Plaintiffs, and the Respondent and certain other persons were Defendants. By this decree it was, *inter alia*, ordered that the Appellants should be at liberty to prove under the sequestrated estates of *Peter Lawson & Son* as a company, and *Charles Lawson*, *Charles Lawson*, junior, *Henry Graham Lawson*, and *George Stodart Lawson*, the only partners of the said company, as such, and as individuals, for the said sum of £65,000, and interest at the rate of 4 per cent. They also founded on an order in the Court of Appeal, dated the 13th of April, 1877, dismissing an appeal taken by the Respondent and others against the said decree with costs (1).

The Appellants now insisted that effect should be given to the

(1) 5 Ch. D. 394, where the facts of the case are set out *in extenso*.

Chancery judgments in the sequestration, and that they should be ranked for a dividend in respect of the claim.

The Respondent met this contention by the plea of *res judicata*, founded on a judgment of this House, dated the 22nd of June, 1876, affirming an interlocutor of the Court of Session, affirming the deliverance of the Respondent dated the 27th of October, 1873, rejecting a previous claim by the Appellants to be ranked in the sequestration for the same identical sum of £65,000, with interest at the rate of 5 per cent. (1)

The history of the former procedure in the Court of Session, *Scotland*, need only be given shortly.

On the 14th of March, 1873, the Appellants lodged their first claim on the bankrupts' estates for £65,000 and £5529 5*s.* in respect of interest at 5 per cent. This claim they withdrew on the 24th of June following, a few days before the adjudication of the trustee.

On the 28th of June they lodged their second claim for the same sum, and on identical grounds, viz., that the said sum was owing to them under the circumstances set out at length in a bill of complaint in Chancery filed the 19th of April, 1873, between the Appellants' company and the Respondent *Molleson* and certain other Defendants, and "as concluded for under the first item of the prayer of the said bill of complaint, a printed copy of which bill is signed by the deponents, and here produced and held as repeated *brevitatis causâ*."

On the 27th of October, 1873, the Respondent pronounced a deliverance by which he rejected the claim. The Appellants appealed (2) to the Lord Ordinary officiating on the bills, and a record was ordered to be made up.

On the 6th of January, 1874, the record ordered was closed, reference being made therein to the before-mentioned bill in Chancery as re-amended holding the statements repeated *brevitatis causâ*.

The Appellants insisted that the proceedings in the Scotch sequestration should be stayed until judgment was obtained in a

(1) 1 App. Cas. 780; Court Sess. Cas. 4th Series, vol. i. p. 840; and vol. iii. (H. L.) p. 77.

(2) 19 & 20 Vict. c. 79, s. 127.

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suit involving the same question, and between the same parties, in the English Court of Chancery; secondly, that the trustee should be ordered to set aside a dividend to meet the Appellants' claim; and thirdly, that the deliverance of the trustee should be recalled.

On the 13th of February, 1874, the Lord Ordinary (*Shand*) repelled the first and second pleas; but allowed the parties a proof of their respective averments.

On a reclaiming note by the Appellants, the First Division, 18th of March, 1874, adhering to the Lord Ordinary's interlocutor, refused to interrupt the sequestration, holding that the Scotch procedure gave every opportunity to prove the debt.

On the 16th of June, 1874, the proof, allowed on the 13th of February, was adduced; and the Lord Ordinary (*Young*) reported the whole case to the Court of Session (1).

It appeared from the proof that 1500 fully paid-up shares of the company, equivalent at the time to £15,000, were handed to Messrs. *Engelbach & Keir*, the purchasers in trust for the *Phosphate Company*. But this fact was not set out in the condescendence.

The First Division subsequently heard counsel on the whole case, and remitted it back to the Lord Ordinary to refuse the appeal and to confirm the deliverance of the trustee, holding that the Appellants were not entitled to be ranked upon the estates.

On the 22nd of July, 1874, the Lord Ordinary pronounced an interlocutor in terms of the remit, and the case was finally disposed of in the Court of Session on the 1st of December following.

The Appellants appealed to this House against the interlocutor refusing to sist the proceedings in the sequestration, and against the subsequent interlocutors on the merits.

On the 22nd of June, 1876, this House (present Lord *Cairns*, L.C., Lord *Chelmsford*, and Lord *Selborne*) affirmed the decision of the Court below, holding that they were right in not sisting the proceedings; and that the Appellants had failed to instruct fraud on the part of Messrs. *Lawson & Son* to entitle them to be ranked for the amount of the purchase-money (2).

During these years the litigation on the bill originally filed on the 19th of April, 1873, was proceeding in the Court of Chancery

(1) Court Sess. Cas. 4th Series, vol. H. L.) at p. 78.

(2) 1 App. Cas. 780; Court Sess. Cas. 4th Series, vol. iii. (H. L.) p. 77.

in *England*. That bill sought to have the Respondent, as trustee of Messrs. *Lawson's* estate, and certain other Defendants held jointly and severally liable to make good the sum of £65,000 and interest thereon, because that under the circumstances set out in the bill the sale of the concession to the Appellants' company was fraudulent and ought to be rescinded, and the money returned to the Appellants.

On the 18th of July, 1873, the Respondent filed his answer, and the other Defendants filed their answers on subsequent dates; in particular, *John Ogle* filed his on the 22nd of November, 1873.

Several new matters having come to light, the Appellants found it necessary to amend their bill from time to time, and they finally did so on the 3rd of March, 1874. The material amendment, so far as affects this claim, was an allegation that out of the £65,000, *Lawson & Son* and certain others agreed that £15,000 should be paid to *Engelbach* and *Keir*, who were the company's agents. And the following was added to the first item of the prayer of the bill:—"Or if this Court shall not think fit to set aside the said purchase altogether, the said above-named Defendants may be decreed to replace the sum of £15,000 improperly paid in shares to the Defendants *Engelbach* and *Keir* in excess of the purchase-moneys payable to the vendors." The plea of the Respondent that he held the sequestrated estates subject only to the orders of the Court of Session was rejected, and he continued a Defendant in the suit.

On the 22nd of March, 1876, after a hearing extending over sixteen days, Vice-Chancellor *Malins* held that the sale of the concession was fraudulent, and it was ordered to be set aside, and that the money should be returned; and, as above mentioned, a declaration was added that the Plaintiffs, the Appellants, should be at liberty to prove in the sequestrated suit in *Scotland* against the estates of the *Lawsons* for the sum in question.

On the 13th of April, 1877, this decree was affirmed by the Court of Appeal (1). Thereupon the Appellants lodged the present claim. The trustee rejected it, contending that it was the same identical claim as formerly rejected by him, the only difference being the amount of interest; and that in the former procedure in *Scotland* the Appellants had full opportunity to sub-

(1) 5 Ch. D. 394.

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stantiate the allegations contained in the finally amended bill in Chancery. Again a condescendence was ordered, and a pleading on both sides took place. The Appellants again put their claim upon the allegations contained in the bill filed in the Court of Chancery; but this time they added that they claimed upon the allegations of that bill as thirdly and finally amended on the 3rd of March, 1874.

The only material matters which are alleged not to have been stated, or pleaded upon by the Appellants, in their condescendence and pleas, in the former appeal to this House, are set out in the 6th article of their condescendence in this appeal, which was as follows:

The said judgments of the Court of Session and of the House of Lords were pronounced upon the questions between the parties, as presented on the record in the said appeal, which differed from the case made by the thirdly re-amended bill and the evidence led before the Court of Chancery. The House of Lords pronounced no opinion on the case raised by the thirdly re-amended bill, and the other pleadings and evidence before the Court of Chancery. Their Lordships' judgments are referred to, from which it appears that the question raised by the present claim is not *res judicata*. There were several matters which were pleaded in the thirdly re-amended bill, and which emerged in the course of the Chancery suit already referred to, and on which the decisions in that suit proceeded, which were not stated or pleaded upon by the Appellants in their condescendence and pleas in the said former appeal, and which were not known to them at the time of the closing of the record in the said appeal. The statements made in answer are denied, and it is explained that until the several answers of *Engelbach*, and *Keir* and *Ramsden*, filed respectively on the 12th of January, 23rd of April, and the 27th of April, 1874, were put in in the Chancery suit, the Appellants had little or no knowledge of the history of the formation of the company, and most of the fraudulent transactions relating thereto, as for instance the alteration of its shares for *Stock Exchange* purposes,—the agreement to pay £15,000 as a bribe to *Engelbach* and *Keir*, in order to induce them to accept the title,—the circumstances under which the requisitions were waived, and the title accepted, and the several deeds and agreements prepared and executed by which the concession was foisted on the company; and further, it was not until the discovery of documents obtained in the suit, and the oral examination of parties and witnesses at the hearing (during November and December, 1875), in particular of *Ogle*, *Forsyth*, and *Henry Graham Lawson*, that evidence was obtained to connect the firm of *Peter Lawson & Son*, and the individual members thereof, with the fraudulent scheme charged against them by the thirdly re-amended bill, and with the additional acts of fraud and misrepresentation in connection with the concession and the company hereinafter condescended upon.

The answer of the Respondent was as follows:

Admitted that the said judgment was pronounced on a closed record, which is referred to for its terms. *Quoad ultra* denied. Explained that the only matter

pleaded upon in the Chancery suit (as appearing from the finally amended bill filed by the Appellants therein), and not specially pleaded upon in the closed record in the former appeal, was the alleged payment of a sum of £15,000 by the promoters of the company to Messrs. *Englebach* and *Keir*, which payment, and the particulars connected therewith, were known to the Appellants long prior to the closing of the record in said former appeal, and prior to the lodging of the original condescendence in said appeal, having been set forth in the answer filed for *John Ogle* in said Chancery suit on the 22nd of November, 1873. Explained further, that the said alleged payment was the subject of proof and discussion in the said former appeal, the whole proceedings in which are referred to, and held as repeated *brevitatis causâ*.

The Appellants maintained that the decree of Vice-Chancellor *Malins* was entitled to receive effect, because it proceeded (1) upon the consideration of matters which were *noviter veniens in notitiam*, and were not founded on in the former case in the Court of Session; and (2) because the present claim was founded on a new *medium concludendi*, which was not founded on, nor adjudicated upon in the former claim.

The pleas in law for the Appellants were:

(1.) In respect of the decree of the Chancery Division of the High Court of Justice, mentioned in the affidavit, the Appellants are entitled to be ranked on the sequestrated estates of *Peter Lawson & Son*, and of the individual members of the firm, in terms of the claim. (2.) The said decree having been pronounced against the Respondent by a Court of competent jurisdiction, and in a suit in which he appeared, and throughout defended, falls to be given effect to. (4.) The judgments of the Court of Session and the House of Lords affirming the Respondent's former deliverance do not decide the question raised by the present appeal, and it is therefore not *res judicata*. (6.) The bankrupts, *Peter Lawson & Son*, and the individual members thereof, having, as set forth on record, fraudulently conspired with the other parties there mentioned to induce the Appellants, by means of fraud, to pay £65,000 for a valueless subject, they are, along with the other said parties, jointly and severally liable to the Appellants in reparation to the amount claimed.

The pleas in law for the Respondent were:

(1.) *Res judicata*. The present claim is based on the same medium as the claim adjudicated on under the former appeal. (2.) The whole material averments of the Appellants having been made in the former appeal, or having been competent to be made therein and omitted, the Appellants are not entitled to a re-trial of the case. (3.) The decree of the High Court of Justice founded on is ineffectual to determine the validity of the Appellants' claim in the sequestration, &c.

On the 10th of April, 1878, the Lord Ordinary (Lord *Adam*) sustained the Respondent's plea of *res judicata;* and affirmed his

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deliverance, rejecting the claim of the Appellants. This interlocutor was adhered to by the First Division of the Court of Session on the 5th of July, 1878 (1).

On appeal to this House,

Mr. *Davey*, Q.C., and Mr. *Alexander Young*, appeared for the Appellants.

Mr. *Cohen*, Q.C., and Mr. *Mackintosh*, were heard for the Respondent.

The following cases were commented on: *Hunter* v. *Stewart*—defence of *res judicata* cannot be sustained where grounds of relief alleged by the bills are different (2); *Kinlochs* v. *Oliphant* (3); *Paton* v. *Stirling*—competent and omitted (4); *Moss* v. *Anglo-Egyptian Navigation Company—res judicata* (5); *Macdonald* v. *Macdonald* (6); *Barrs* v. *Jackson*—opinion of *Knight Bruce*, V.C., and Civil Law cited (7); *Duchess of Kingston's Case*, and *Doe* v. *Oliver*, and notes thereon (8); *Godard* v. *Gray*—examinability of foreign judgment (9); *Howlett* v. *Tarte*—estoppel (10); *New Sombrero Phosphate Company* v. *Erlanger*—fraud—rescission of contract (11); *Bagnall* v. *Carlton* (12); *Lindsay Petroleum Company* v. *Hurd* (13); *Stewart* v. *Stewart* (14); *Southgate* v. *Montgomerie*—foreign decree (15); *Roy* v. *Kirkland* (16); *Goetze* v. *Aders, Preyer, & Co.* (17); *Erskine* 4, 3, 4; *Stair* 4, 1, 44, and 4, 40, 16; s. 127 of 19 & 20 Vict. c. 79; see also *Gillespie* v. *Russel* (18); *Strathmore* v. *Strathmore's Trustees* (19); *Wilkie* v. *Cathcart*—question of jurisdiction (20).

(1) Court Sess. Cas. 4th Series, vol. v. p. 1125; Scottish Law Rep. vol. xv. p. 666.

(2) 4 D. F. & J. 168, and at pp. 176, 179; 31 L. J. (Ch.) 346.

(3) Morr. Dic. 12,233.

(4) Ibid. 12,229.

(5) Law Rep. 1 Ch. App. 108.

(6) Court Sess. Cas. 2nd Series, vol. ii. p. 889; affirmed, 1 Bell's App. 819.

(7) 1 Y. & C. Ch. 585, at pp. 587, 589; on appeal reversed, 1 Phil. 582.

(8) 2 Sm. L. C. 8th ed. at pp. 784, 801, 830, 837, 839.

(9) Law Rep. 6 Q. B. 139; 40 L. J. (Q.B.) 62.

(10) 10 C. B. (N.S.) 813.

(11) 5 Ch. D. 73.

(12) 6 Ch. D. 371.

(13) Law Rep. 5 P. C. 221.

(14) Court Sess. Cas. 1st Series, vol. xvi. p. 632.

(15) Ibid. 1st Series, vol. xv. p. 507.

(16) Ibid. 2nd Series, vol. xvi. p. 51.

(17) Ibid. 4th Series, vol. ii. p. 150.

(18) Ibid. 2nd Series, vol. xix. p. 897; on appeal, 3 Macq. 757.

(19) Ibid. 1st Series, vol. xi. p. 644.

(20) Court Sess. Cas. 3rd Series, vol. ix. p. 168.

The Law Peers delivered the following opinions:—

EARL CAIRNS, L.C.:—

My Lords, this case has been argued with great force and ability by the learned counsel for the Appellants and the Respondent; but in the view which I take of the case it will not be necessary that I should go at any great length into many of the questions which have been brought before your Lordships. With regard to the point which really has to be determined the narrative of the facts seems to me to lie in a very small compass.

My Lords, in the year 1873, there being a sequestration of the firm of *Lawson & Sons*, in *Edinburgh*, a claim was made by a person who represented the *Phosphate Sewage Company*, the present Appellants, to prove for a particular debt. The character of that debt he described in the document which made the claim. He described it in this way:—he said there was due and owing a very large sum (£70,000 and upwards) by the bankrupts to the *Phosphate Sewage Company*, "under the circumstances set forth at length in the bill of complaint in Chancery," (that is in the Chancery of *England*) "filed on the 19th of April, 1873, between" certain persons there mentioned, "and as concluded for under the first item of the prayer of the said bill of complaint, a printed copy of which bill is signed by the deponent," "and is herewith produced and held as repeated *brevitatis causâ*;" that is to say, his case was, I have filed a bill in the Court of Chancery in *England*, and I have described in that bill the circumstances under which I claim this debt against the estate under sequestration, and I hand in the bill as a narrative of the facts on which my claim is founded. The trustee under the sequestration refused to admit the claim, an appeal was made from the trustee's decision to the Court of Session in the ordinary way, a pleading was ordered to take place, and there was a condescendence and an answer. The condescendence again referred in terms to the bill of complaint, which was then pending in the Court of Chancery in *England*, and repeated the allegations contained in that bill of complaint, that bill of complaint having been filed, as I have stated, on the 19th of April, 1873. The case upon that condescendence and upon those facts, came before the Lord Ordinary and the Court of Session in

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Scotland, and ultimately came before your Lordships' House. The result of the decision was that the *Phosphate Sewage Company*, represented by their liquidator, were held not to have proved and not to be entitled to, the debt which they claimed against the estate under sequestration. That is *res judicata* upon those facts, and upon those materials to which I have referred, and there is no question that it cannot now in any way be set aside; that decision stands as perfect and complete law.

Then the bill of complaint which was pending, as I have stated, in the Court of Chancery in *England*, went on in the ordinary course of Chancery litigation in this country. The bill was amended in a manner which I shall afterwards mention, and it came on for hearing in the Court of Chancery, and a decree was made by the primary Judge, and affirmed by the Court of Appeal, declaring that the *Phosphate Company* were entitled against certain parties to that litigation to relief, and to be paid a large sum of money. One of these was the trustee of this sequestrated estate. Of course, against him there could be no order that he should pay any money, for he was not personally liable; and against the sequestrated estate there could be no order, because it was not within the jurisdiction or under the administration of the Court of Chancery in *England*. But a declaration was made (I will not stop to consider whether it was entirely in accordance with international comity or not) that the Plaintiffs in that suit, the *Phosphate Company*, should be entitled to go in and prove in the sequestration suit in *Scotland* against the estate of the *Lawsons* for the sum in question. That having been done, the *Phosphate Company* again applied in *Scotland* to the sequestrator.

I have mentioned this suit in the Court of Chancery in *England*, but it really appears to me that the case need not be embarrassed with any question as to a foreign judgment, or the validity or the examinability of a foreign judgment. When I find an application again made to the sequestrator in *Scotland*, it seems to me that it is just as if the application had been made *de novo* in the sequestration in *Scotland*, without there having been in the meantime any judgment in a Court in *England* at all, and that the application in *Scotland* must be judged of just as if a fresh proceeding or a fresh suit had been instituted in *Scotland*.

Now, what was the fresh proceeding, and what was the fresh application in *Scotland?* The *Phosphate Company* again applied to the sequestrator, and again applied upon a document which was the foundation of the claim, and this time the *Phosphate Company* in its document of claim said, We apply by virtue of a decree, and for payment of the sum mentioned in a decree, of the Court of Chancery in *England.* The sequestrator refused the claim; and, as before, the question came before the Lord Ordinary and the Court of Session, and, as before, a condescendence was ordered, and a pleading upon both sides. At the outset, when the condescendence is looked at, you find that the *Phosphate Company* again put their claim upon the allegations contained in the bill filed in the Court of Chancery in *England;* but this time, in place of saying that they claim upon the allegations of the bill filed in the Court of Chancery in *England* on the 19th of April, 1873, they say they claim on the allegations of that bill as thirdly amended on the 3rd of March, 1874.

Of course, if they had claimed on the allegations contained in the bill filed on the 19th of April, 1873, there would have been nothing to argue; the case would have been absurd, and at once out of Court. The only colour upon which the second action in *Scotland* can be supported is whatever difference there may be found to be between the allegations in the bill filed originally on the 19th of April, 1873, and the bill as amended on the 3rd of March, 1874. If there is no difference, then the case is just as hopeless as if it had been launched upon a repetition of the allegations in the original bill. If there is a difference we must ascertain what that difference is, and whether it will afford a ground for a new action without the bar of *res judicata* being pleadable; and secondly, whether this new and different matter was matter which was in the knowledge of the *Phosphate Sewage Company* at the time when the first suit was disposed of.

Now, my Lords, what is the difference? The difference appears in certain red-ink alterations which represent the ultimate amendments of the bill in Chancery. I need not go through them in detail, because it is admitted that among those red-ink alterations there is only one that has any bearing at all upon the case, or assumes the appearance of a new ingredient in the case, and that

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is an allegation that of the purchase-money mentioned in the bill as it originally stood, and the repetition of which was sought, namely £65,000, while £50,000 was to be paid to *Hartmont, Lawson, Son, & Ogle* in certain shares, they agreed between themselves that £15,000 should be paid to the Defendants *Engelbach* and *Keir*. It is said now that that was a circumstance which gave a still more fraudulent character to the transaction than it originally possessed, and that that is a material difference between the original statements and the statements by amendment.

I must, however, stop here for the purpose of observing that when I turn to the prayer of the bill after this amendment, I find that in the prayer of the bill, ranging over ten paragraphs, there is no alteration whatever in the amended bill except in the first paragraph, and it was upon the conclusions of the first paragraph that the claim in the original suit in *Scotland* was founded. Now, my Lords, what is the alteration which is made in the first paragraph of the prayer? There is no alteration whatever as regards the claim that the estate of *Lawson & Sons*, and the other persons mentioned should be held liable to repay the £65,000 and interest. The only alteration is this; there is added an alternative prayer, which for the present purpose may be entirely put out of the case, but which seems to exhibit what was considered by the pleader to be the materiality of this question as to the £15,000. The alternative prayer is this: "Or if this Court shall not think fit to set aside the said purchase altogether, the said above-named Defendants may be decreed to replace the sum of £15,000 improperly paid in shares to the Defendants *Engelbach* and *Keir* in excess of the purchase-moneys payable to the vendors."

The idea, therefore, does not at this time seem to have been that the question of the payment to *Englebach* and *Keir* of £15,000, introduced by way of amendment, gave any new aspect or any new strength to the main case alleged by the bill, the case for the repetition of the whole purchase-money, but that it gave rise to a separate and independent and alternative relief which might become available if the other relief primarily sought were not given, namely, the relief to have back the £15,000 upon the ground I have mentioned. That is entirely out of the case,

because that relief was not ultimately given. The result therefore is this, that as I read the bill, although it is true there is this difference between the original bill and the amended bill, that whereas in the original bill nothing was said specifically or particularly about this £15,000, it is mentioned particularly in the amended bill, and is mentioned, I will concede, in a way that may add an additional particle of proof of fraud, yet it is mentioned as a separate ground for relief which has become immaterial.

Before I consider whether the addition of an additional ingredient as to fraud would become material, the question arises, when did the Plaintiffs know of this payment of the £15,000? Now, my Lords, here the dates are material. The bill was amended, as I have said, and assumed its final shape on the 3rd of March, 1874. The statement in the present condescendence on that subject is this, "There were several matters which were pleaded in the thirdly re-amended bill, and which emerged in the course of the Chancery suit already referred to, and on which the decisions in that suit proceeded, which were not stated or pleaded upon by the Appellants in their condescendence and pleas in their said former appeal, and which were not known to them at the time of the closing of the record in the said appeal. The statements made in answer are denied, and it is explained that until the several answers of *Englebach* and *Keir* and *Ramsden*, filed respectively on the 12th of January, 23rd of April, and 27th of April, 1874, were put in in the Chancery suit, the Appellants had little or no knowledge of the history of the formation of the company, and most of the fraudulent transactions relating thereto, as for instance the alteration of its shares for *Stock Exchange* purposes, the agreement to pay £15,000 as a bribe to *Englebach* and *Keir* in order to induce them to accept the title, the circumstances under which the requisitions were waived, and the title accepted, and the several deeds and agreements prepared and executed by which the concession was foisted on the company." Then they go on to say that they had not a discovery of the documents until afterwards.

Now, my Lords, taking that as it is stated, it would appear that certainly at the latest, on the 27th of April, 1874, they had know-

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ledge of it. It must of course have been known to them before that: it must have been known to them on the 3rd of March, when the bill was amended; indeed, on the 12th of January they must have had some knowledge by the answer. But we have now this clearly, that in the answer of the Defendant *Ogle*, which was put in on the 22nd of November, 1873, there was a statement that this £15,000 had been paid.

My Lords, your Lordships are informed by the learned Judges of the Court of Session that although the record was closed in the original proceeding in *Scotland* before the 3rd of March, 1874, the proof was not led in it until the 16th of June, 1874, and that it would have been competent, and almost a matter of course, for the *Phosphate Company* at any time before the proof was led, on ascertaining this additional fact or these additional facts, if they considered them material, to have applied to open the record and close it again, and led their proof upon the whole of the facts which had thus come to their knowledge.

Now, my Lords, these being the facts of the case, my first observation is this. As I understand the law with regard to *res judicata*, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before. Now I do not stop to consider whether the fact here, if it had come under the description which is represented by the words *res noviter veniens in notitiam*, would have been sufficient to have changed the whole aspect of the case. I very much doubt it. It appears to me to be nothing more than an additional ingredient

which alone would not have been sufficient to give a right to relief which otherwise the parties were not entitled to. But it is unnecessary to dwell upon that, because it is perfectly clear upon the statement of the present Appellants themselves that this fact was within their knowledge before their proof was led in the former action, and they were just as free to have had the record opened and to have had it stated, as if it had come to their knowledge before the record was closed.

My Lords, that being so, it appears to me that it would be contrary to the whole principle upon which litigation under the rule of *res judicata* is made to be final, to allow this litigation to be reopened upon the ground which is alleged. It appears to me that looking at this, as we must look at it, as a fresh litigation commenced in *Scotland*, those who are commencing it have nothing upon which they can base it, except an allegation that there was not in the former litigation a mention made of the payment of this £15,000 and of the shares into which it was turned, and that those facts not having been mentioned upon the former occasion, the *Phosphate Company* should therefore be allowed to have a new litigation in order to introduce those facts. They are met at once by the circumstance that the facts were within their knowledge, and that they might have taken proceedings to have brought them before the Court on the former occasion.

It appears to me, my Lords, that the unanimous decision of the learned Judges of the Court below, the Lord Ordinary, and the Lords of Session, is one which is entirely satisfactory (1). I do not go into any greater detail, because the case has been so fully and so satisfactorily disposed of by them. I shall simply submit to your Lordships that this appeal should be dismissed with costs.

LORD HATHERLEY:—

My Lords, I entirely concur in the opinion which has been delivered by my noble and learned friend on the woolsack.

I confess that during a portion of the argument I was very much struck by the length to which it was supposed that the doctrine could be pushed of amending a case by introducing

(1) Court Sess. Cas. 4th Series, vol. v. p. 1125.

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matter which was in the knowledge of the parties making the claim, provided only that that new matter would give them a new and additional cause for advancing their suit, and a new and additional right to have that suit decided in their favour. I asked during the argument for authority—for a reference to any case in which persons had been allowed to do that when they had had full knowledge of the various ingredients making up a case of fraud, which materials in many cases are extremely abundant, but had exercised the right of keeping back a portion of those materials within their knowledge which might possibly have led to some variation in the relief granted, and which were but part of the one great scheme of fraud, and were treated by them in the last instance as part of the one great scheme of fraud, by which they were deceived, and in respect of which, as in the present case, in the Court of Chancery in *England* they obtained relief.

The course which this cause took in the Court of Chancery was this: The record alleged certain *indicia* of fraud which seem to have been sufficient in the minds of the Judges of that Court, and not to have been at all set aside. The *indicia* alleged seemed to them sufficient to establish the case as alleged in the first claim in that suit. Afterwards it was found that there was an additional and a considerable evidence of fraud, namely, the bribing of an agent who had been employed in carrying the transaction into effect. That seems to have been discovered after the filing of the original bill in the suit below, but in time to have it inserted by way of amendment in the bill which was amended about a year afterwards, and in time to have it inserted also, if the parties had chosen so to do, in the record in the litigation which they were carrying on in *Scotland* in reference to establishing a claim against the estate of *Lawson & Sons.* They failed upon the previous occasion, as has been described by my noble and learned friend on the woolsack, in the Courts of *Scotland,* and ultimately in this House.

The additional matter seems to have come to the knowledge of the parties, who are the Appellants in the present case, between the period of their filing their original bill in Chancery and the period of their amending it on the 3rd of March, 1874. Probably, the first intimation which they received of it was derived from the

answer of *Ogle*, to which reference has been made. What was done upon that occasion? No doubt it was an instance of gross fraud. That must be the character of an attempt to bribe the agent of any person with whom you are dealing with respect to a purchase, or a sale, for it would be the same in either case, in order to bring you, the purchaser or the vendor as the case may be, into a position in which by false representations, or by silence where there ought to have been disclosure on the part of your agent, you are led, believing your agent to be honest, into either the sale or the purchase in question, which you desire to get rid of. If it had been a case of a sale of your own property, the agent could not so well be bribed out of the fund which was to be produced as the result of the fraud; but in the case of a purchase, of course, there are ways and means, some of which were adopted in this case according to the statements before us, of bribing the agent by giving him a share of the purchase-money which is to be obtained by means of his agency and his fraud. When that takes place there are two or three ways in which the fraud may be perpetrated, and two or three methods also in which the person defrauded may secure a right to be recouped in respect of the injury he has thereby sustained. Either he may do as has been done in the case of this bill in which this fraud of paying the briber was brought forward, either he may say, If you do not give me the larger relief which I think I am entitled to (and which he ultimately obtained in Chancery), at least set me right with my agent and take care that I have the £15,000 which he has received, or obtained a right to receive, as between himself and his co-conspirators, whatever may become of the larger claim I make. But ultimately the larger claim was sustained, and therefore the £15,000 was at once put out of the question. Or a second point upon which he may rely is this: This was a portion of the fraud I alleged in my original bill; my original bill stated a case of fraud upon which I said I was entitled to relief, but I can now fortify it by shewing that he who ought to have protected me, namely, my own agent, has been himself a party to the fraud and has been a co-conspirator with the rest in endeavouring to defraud me of my money. That is only an additional proof of the fraud alleged.

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Therefore, my Lords, I come round again to this question, Is it or is it not the law (I do not know any authority going to that extent) that if a man has been the victim of a fraud of this description in the purchase of a mine or the like—if a man has been led and induced to become the purchaser of property by a variety of fraudulent misrepresentations—he may bring forward his case and enter upon a litigation for the purpose of putting himself in the position in which he was before the fraud was committed; and that he is to be allowed to select a certain number of instances of that conduct which led up to the successful result of the fraud, to select as many of those instances as he may think proper, and to put them in the forefront of his proceedings to set aside the transaction; and afterwards, having a certain number of other circumstances within his knowledge, he is to be allowed to bring forward those circumstances and say, This is a new *medium concludendi* with regard to the case I am now bringing forward; this will be an independent case, which I shall be entitled to assert. If so, we might go through all the various circumstances and acts of fraud which led to the result; we might go through them one by one and year by year, so far as I can see, according to that line of argument. From time to time, as the matter passes through all the stages of litigation, the Plaintiff might say, I have now brought forward another fact; this is the fact which you have not yet decided upon; this is not *res judicata*, because it is a portion of evidence which I have not presented to your minds before; I have failed to prove, or I have failed to satisfy you of the sufficiency of the proof with respect to the several facts I alleged in my original attempt to obtain justice, and now I proceed to bring forward other facts of a still stronger character, which I think will persuade the Court I am addressing to give me the relief which upon the first shewing of the case they were not satisfied to give me upon the evidence I was then able to produce. My Lords, I should be very much surprised if that was held to be the doctrine of any Court, or if in any civilized country litigation could be protracted in the endless manner that it would be if that were the state of the law.

However, my Lords, in this case what has happened? The information was acquired, as has been described, at a time when

the Appellant might have introduced it. He did introduce a statement of it into the bill in Chancery by an amendment, and he might have introduced it into this claim in the Scotch Court by amendment also, as we are told by the Scotch Judges, at the time he became acquainted with it, although it was after the record was closed, upon making a due and proper application to have an opportunity of so stating his case. He brings it in as a simple *indicium* of fraud without insisting upon any other relief, because he obtained from the Court of Chancery that which he considered much better than the alternative relief which he glanced at, but did not further pursue, when he first introduced the mention of the bribe of £15,000.

He having done that, it appears to me to be quite clear that it falls within the operation of the plea put in on the other side in this action; and, therefore, all that we can do is to follow the view which has been most clearly and admirably expressed in the several judgments in the Court below (1). I think that those learned Judges have come to the right conclusion, and that their interlocutor, which is complained of, should be affirmed, and that this appeal ought to be dismissed with costs.

LORD BLACKBURN:—

My Lords, I am so entirely of the same opinion as my two noble and learned friends who have already spoken, that I should scarcely have thought it necessary to add anything, if it was not that I wish to point out that there are a great many of the topics which were discussed in the Court below, and have been here also discussed at the Bar, which do not seem to me to come into question, and upon which it is not necessary to pronounce any opinion at all. [Having stated briefly the point upon which the case turned, as above, p. 803.]

My Lords, I think the law of *Scotland* is clear enough, that upon an ordinary action, where you seek to recover anything, *res judicata* is an answer subject to two observations. The one is that where there is *res noviter veniens in notitiam*, which is nearly equivalent to saying that you were taken by surprise and have since discovered material evidence, you have a ground; if there

(1) Court Sess. Cas. 4th Series, vol. v. p. 1125.

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is *res noviter veniens in notitiam* (I do not at present inquire when or under what conditions), then the plea of *res judicata* will not avail. Now here it is alleged that various matters freshly came to the knowledge of the Appellants. I will not weary your Lordships by repeating over again what has been so clearly stated by the noble and learned Lord on the woolsack, that all that is alleged to have freshly come to their knowledge is proved to have come to their knowledge at a time when they might have pleaded it in the first proceeding before there was the determination in favour of the trustee. Secondly, there is a ground where there is a fresh *medium concludendi*; the Plaintiff in the action is not obliged to join all his *media concludendi* in one suit; if he has one *medium concludendi*, and fails in proving that, he may start another, and that whether or not he knew of it at the former time, provided it be a separate *medium concludendi*.

Now, my Lords, in the Court below it was doubted whether an appeal against a decision of a trustee in bankruptcy comes within this last rule, and there was at least a plausible reason suggested for holding that it is not like an ordinary action, and that the parties appealing were bound, since they did start upon it, to produce their whole case of claim, and if they had a score of different *media concludendi* to establish the fact that they could prove against the sequestration, they were bound to bring them all forward. That is one of the points which have been discussed; but it is not necessary to decide it, and I therefore say nothing more about it.

Assuming, however, that the appeal against the decision of the trustee is like an ordinary action, and assuming (what I by no means wish to be supposed to say) that in that case you may bring on a fresh *medium concludendi* although you knew of it before, there arises the question, was what is now produced a fresh *medium concludendi*?

One word I may say upon an argument which, however, was almost abandoned before the discussion was finished. The Court of Chancery decided that this contract was voidable and set it aside, and when the Appellants came with the decree of the Court of Chancery, saying, The contract has been annulled and the price is repayable by *Lawsons* amongst others, they attempted to say, That is a fresh *medium concludendi*, and even if it were a foreign

Court, provided that Court had jurisdiction, the Court of Session in *Scotland*, or a Court in any other country, ought, either from comity, that is to say politeness, or as a matter of right, to give force to that judgment. My Lords, I need hardly point out that no question really arises here upon what ground a judgment of a foreign Court is or is not to be enforced. Putting it upon the very highest ground, that the Defendant against whom the judgment has been given in a Court having jurisdiction over him, is under an obligation to obey that judgment which will be enforced by the Court in *Scotland*, it is equally clear here that the *Phosphate Company*, which had sued in *Scotland*, are under a perfect legal obligation to obey the decision of the Court of Session affirmed by this House as the Supreme Court of Appeal for *Scotland*, and it would be enough to say that that decision was entitled to equal respect. But for two reasons it happens to be entitled to very superior respect: in the first place, the Scotch judgment was given first, and, in the second place, the Scotch judgment was given in *Scotland*, which was the domicil, the country in which the action was brought. Therefore I take it that it is quite plain that if the decision of the Court of Chancery is to be considered as a foreign judgment, which probably it is in *Scotland*, no question of enforcing it arises here.

The question is entirely reduced to this one point, and this one point only, were the matters alleged new? The *Phosphate Company* say that in the present appeal against the second decision of the trustee they rely upon the amended bill. The new matters are very easily seen there, because they are printed on the bill in red ink. They are alleged in the condescendence upon which the parties proceeded in the present case. They proceeded upon these new matters in their bill, and the question, I apprehend, comes to be at once, Are these new matters? I think it amounts in substance to this, that it was found out, but not too late to put it in the pleadings in the previous case; that amongst other means of carrying out the fraud, the *Lawsons* had been parties to giving a bribe of £15,000 to *Engelbach* and *Keir* who were parties to the fraud.

My Lords, upon the question whether that is a new *medium concludendi*, or merely a piece of evidence tending to support the

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former case, I am very clearly of opinion that it is only a fresh discovery of evidence, a fresh ingredient tending to prove the fraud upon which they relied. I do not enter into the details upon which I found that opinion. They were stated first of all very clearly by Lord *Shand* in his judgment, and they have been since stated very clearly both by my noble and learned friend on the woolsack and by my noble and learned friend opposite (Lord *Hatherley*), and therefore it is not necessary for me to try to throw fresh light upon what has been three times, to my mind, most satisfactorily stated.

LORD GORDON:—

My Lords, I quite adopt the observation which has just been made by my noble and learned friend upon the other side (Lord *Blackburn*) that the matter has been so very clearly brought out by my noble and learned friend on the woolsack, and also by the learned Judges in the Court below, that no additional observation is really required in support of the judgment which has been proposed to your Lordships. I think very clearly that the judgment of the Court below is generally right. I do not go into all the particulars, but I think it is substantially right, and we are doing what is quite right in affirming that judgment.

Interlocutors appealed against affirmed; and appeal dismissed, with costs.

Lords' Journals, 8th July, 1879.

Agent for Appellants: *John Holmes.*
Agents for Respondent: *Laurance, Plews, & Baker.*

[HOUSE OF LORDS.]

THE LORD PROVOST, MAGISTRATES, AND TOWN COUNCIL OF EDINBURGH } APPELLANTS;
THE LORD ADVOCATE (*ex parte* AS TO M'LAREN) . . . . . } RESPONDENT.

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July 21.

Immixing of Charity Funds—Increase of Value of Joint Estate—Proportionate Division of Profits ordered.

In 1695 a truster settled, in connection with *Trinity Hospital, Edinburgh* —a charity for the support of indigent and sick persons—a sum of money secured on bonds. The interest in perpetuity was to be employed in the maintenance in the hospital of twelve poor persons; the preference to be given (1) to those of the truster's kindred; (2) to those of his name; and (3) if these did not apply then to indigent persons generally. He appointed as the patrons the lord provost and town council of *Edinburgh*, and the ministers of the burgh present and to come. The lord provost, magistrates and town council were governors of the hospital, and got control of the fund in 1700, and administered it as if part of the general charity funds of the hospital, mixing the interest with the general income of the hospital, and from the mixed income defrayed the expenses which they incurred for the whole charity, without making any distinction in the accounts.

The bonds of the settled sum were paid up in 1744 and 1753, and were subsequently, with other charity moneys lent to the city of *Edinburgh*; and on them a great loss occurred.

Other funds of the hospital had been invested in land in 1734, and that land had increased greatly in value. The ministers of the burgh never took any part in the administration of the fund. In a question whether the settled fund, on being ordered to be separated, was to participate in the present increased value of lands purchased since 1700; and whether the ministers had now a right to be joined in the administration:—

Held, affirming the decision of the Court below, that (1) the fund had been so inextricably mixed with the general charity funds, that it must be taken to have participated proportionally in the increased value of the hospital funds, and that in valuing the aggregate funds all lands purchased since 1700 must be valued and taken into account; (2) that notwithstanding the length of time during which a contrary practice had prevailed, the ministers should be joint administrators.

APPEAL from the Court of Session, *Scotland*, against parts of two interlocutors.

Trinity Hospital, Edinburgh, was originally a charitable foundation in connection with *Trinity College Church* of that city. It

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was founded in the fifteenth century by *Mary* of *Gueldres*, widow of *James* II. of *Scotland*; but after the Reformation it was reconstructed. The Appellants, the lord provost, magistrates, and town council of *Edinburgh*, were its administrators. The object of the charity was the support of indigent and sick persons, formerly called bedesmen. Besides its original endowments, it received, at various times, numerous separate mortifications; most of which were destined for the benefit of the poor of the hospital generally; but some were bequeathed for the benefit of a limited class, or were affected by other special provisions.

In a suit at the instance of certain beneficiaries for the proper administration of its funds, the hospital has frequently been the subject of judicial proceedings (1), and the Court of Session has had to decide upon many questions; but the points involved in this appeal relate solely to the administration of one of the above-mentioned special funds, known as the *Alexander Mortification*.

The mortification is contained in two writings, a principal deed and an eik (2); both dated the 23rd of October, 1695. In the principal deed Mr. *James Alexander*, the truster, on the narrative that certain debts secured on bonds were due to him by the Earl of *Annandale* and Sir *James Johnstone* of *Westerhall*, disponed "to, and in favour of *Trinity Hospital*." The deed, so far as material, then continues:

> And to the poor thereof, after specified, and to *John Miller*, present threasurer and succeeding threasurers thereof, for the use and behove and to the effect after specified ALL and HAILL the soume of fourtie thousand merks Scots, the yearly interest to be employed towards accommodating and intertaining twelve indigent personnes, viz., eight men and four women . . . qualified and applying in the manner after mentioned . . . who have been of good reputation, and have not fallen into decay through their own vice or prodigality, to be received into the said hospitall, . . . and to be accommodate and intertained therein at the rate and expense of the other persones who are or shall be received in and entertained upon the former mortificatione belonging to the said hospitall, which at present is estimat to one hundered and twentie punds, and the superplus of the annual-rent, . . . which, at sex for the hundered, . . . extends to two hundered and fourtie merks yearlie, . . . to be equallie divyded amongst the said twelve indigent persones, being twenty merks money foresaid, to ilk ane of them

(1) (1864) 4 Macq. 603; Court Sess. Cas. 2nd Series, vol. xxii. p. 1222; and (1869) Law Rep. 1 H. L., Sc. 427; Scot. Jur. vol. xxxix., p. 65; Scot. Law Rep. (1866), vol. iii. p. 84.

(2) An additional enumeration of sums given.

yearlie . . . by and attour the ordinairie allowance of the other persones in the said' hospitall, the saids indigent persons being always subject to the laws of the said hospitall.

The deed then continues:

And in caise by the frugull and verteous manadgement of the said hospitall the expense and charge of accommodating and intertaining the saids twelve persons in maner forsaid shall not extend to and exhaust the haill annualrent yearlie of the said principal soume, then, and in that caise, I doe heirby destinat and appoynt the superplus thereof to be imployed yearlie and joyned to the said stock, and the annualrent of the new stock to be imployed for intertaining of more of the like indigent persones at the rate aforsaid, so far as the samen will reach.

The qualification is thus expressed:

First, those of my own kindred, friends and relatives upon father or mother side: Secondlie, those of my own surname of *Alexander*, who shall apply for the benefits thereof within the space of three score days nixt after any vaccancies shall occure, and that whither they be burgesses of *Edinburgh* or not; and failzeing these, of such indigent persones qualified in manner forsaid, as the saids patrons underwritten shall think fitt. . . . And the ease and benefite of the said vaccancies is hereby appoynted to run up and be added to the said stock, except the necessarie expenses of the burialls of the said persones by whose decease the said vaccancies occurs. And which modification a'wryn I doe heirby appoynt to take effect by the said patrons receiving in and admitting of the said indigent persones within the space of six months at farthest nixt after my decease.

The deed then proceeds to dispone in favour of the hospital, and indigent persons foresaid:

Threasurer of the said hospitall, and his successors in the said office of threasurer and patrons after specified, feoffees of trust and administrators for the use and behove of the said hospitall and indigent persones forsaid, All and Haill the principal sums and securities held for the same.

Then comes a provision that,

How often the sums mortified, or any part thereof, shall be uplifted be the threasurer of the hospitall and patrons forsaid, they shall be bund and obleidged of new againe to secure, wair, bestow, and imploy the same upon sufficient and well holdine land, or other good and sufficient securitie for annualrent, payable to the said threasurer of the said hospitall and patrons thereof and their successors, . . . for the use and behove of the said hospitall and indigent persones forsaid. . . . And with this express provisione, . . . that the saids twelve indigent persones, and such as may be added, . . . shall be intertained upon the annualrent of the said soume of fourtie thousand merks forsaid, and new stock, in caise the samen shall be augmented," "and that it shall noways be in the power of the said threasurer, &c., to apply any part of the principal sum . . . or augmented stock . . . for the maintenance of the said twelve indigent persones, but that the same shall remain enteir, unbroken upon, or medled with, nor

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applyed to any other use, but to remain as a perpetuallie mortified stock to the use and behove forsaid in all generationes to come.

The patrons of the mortification are thus appointed, and put under the inspection of the Court of Session:—

And for the good and effectuall performance, manadgement, and right applicat'ne of this my grant and mortificat'ne, witt ye me to have nominat and appoynted, lykeas I, the sd. Mr. *James Alexander*, be thir presents nominate, appoynt, and earnestlie requist the Right Honorall. the Lord Provost, and bailzies and counsell of *Edinburgh*, and yr. successors in office, for the communitie yrof, and ministers of the said burgh, present and to come, to be the sole and undoubted patrons of this my grant and mortificat'ne: And farder, I heirby nominate, appoynt, and earnestlie intreat the Right Honorall. the Lords of Councell and Sessione, for the time being, to take the inspectione and oversight of this my grant and mortificat'ne, that the samen be punctuallie and exactlie keeped, observed, and fulfilled be the sds. patrons and theasurer of the sd. hospitall for the time being, according to the tenor of this my present gift and mortificat'ne in all poynts, &c.

Mr. *James Alexander* died in 1696.

In 1869 the Court of Session, carrying out a judgment of this House dated 1864, remitted to Mr. *Macpherson*, Professor of Scots Law in the University of *Edinburgh*, to inquire as to the property and administration of the *Trinity Hospital*, and to report a scheme for the future administration of the funds of the charity, "having reference to the terms of the charters, grants, and mortifications" in its favour.

In accordance with this remit, elaborate reports and relative appendices were from time to time prepared by Mr. *Macpherson*. The material points of these reports, as far as regards this present case, were as follows:—

The funds of the hospital from the earliest period were lent by the magistrates as governors of the hospital to the magistrates as representing the burgh. And at the date of the *City Agreement Act* (1835) £4500 were due, which resulted in a loss to the charity of £1489. 18*s*.

The funds were also invested in land. Since 1700 there was purchased the *Dean* estate (1739), which, under the name of *Blinkbonny* and *Dean Park*, has greatly increased in value owing to its being a capital building site. There was also purchased in 1795 five additional acres at *Coatfield*, and in 1828 other trifling purchases of land.

"The *Alexander* trust estate amounted to 40,850 merks (Scots), lent to the Earl of *Annandale* and *Johnstone* of *Westerhall*; they were paid up respectively in 1743–4 and 1753."

"The amount received in sterling money from the Earl of *Annandale* was £1900, and from *Johnstone* of *Westerhall* £544 13*s*." After these sums were paid

up, the whole, except about £100, was lent at various times to the city at 4 per cent. interest. "Thus the *Alexander* fund supplied more than half of the £4500 on which occurred the loss of £1489."

"The first impression of the reporter was that the *Alexander* deed of mortification created a separate trust, and that the fund must necessarily be kept separate in order to carry out the purposes of the trust. But he found, after examining the accounts, that after the first few entries there is no reference to the name of *Alexander;* and the interest of the bonds were treated as part of the general income of the hospital charity."

"It does not seem to follow from the case of *Cuthill* v. *Burns* (1) that, because the money can be traced, it must be treated as ear-marked, and kept separate. He thinks the governors did not understand themselves to be so dealing with it, unless possibly at the date of their minute in 1838." How completely they regarded the trust as merged in the general charity is illustrated by the way in which, when they came to settle the price of the *Dean* estate, purchased in 1739 (1734), they directed *Westerhall's* bond, along with others, to be called up to meet the expenses of improvement on the estate; but the treasurer did not act on the directions, and the money remained in *Westerhall's* hands until 1753.

"The investments actually made were not made in terms different from those applicable to the other funds of the hospital, or indicating that they were to be kept separate for the *Alexander* mortification." They were not, as directed by the deed of foundation, taken "payable to the treasurer of the said hospital and patrons thereof." The inference is that the governors never intended to keep the *Alexander* funds separate from the rest of the hospital property.

There is every reason to suppose that the full number of twelve indigent persons were on the roll in 1700; but there soon occurred vacancies. From a list made up it appeared that from 1739 to 1802 seven is the general number of inmates on the fund.

On the vacancies admitted on the face of the minutes between 1745–1750, there ought to have been in 1750 an accumulation of upwards of £300 without charging interest. For the first eleven years after 1802 there was under expenditure, over expenditure then continued till 1831. From 1832 to 1861 there never has been spent as much as the interest at 5 per cent. of the original capital, taking that as £2270. If the accumulations are to bear compound interest there are but ten years of the present century in which the whole interest has been expended, and the whole accumulations with compound interest would amount to £8000, which sum does not include the original capital. Even taking the account from 1832, the savings without interest amount to £813 2*s.* 6*d.*, and with compound interest to £2350.

"It does not appear that the ministers ever claimed, or even as a body heard, that there had been conferred upon them a special interest in this fund." But from 1720 to 1738 the affairs were managed by a committee on which there was always two of the city clergy, who might have had access to the trust deed if they had chosen. The committee was abolished in 1738, and since then none of the ministers have ever acted.

The reporter suggested that the *Alexander* fund should be

(1) Court Sess. Cas. 2nd Series, vol. xxiv. p. 849.

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separated from the General Hospital charity, and administered as a separate trust.

The Appellants objected to the proposed rectification of the hospital accounts. They submitted that the presumption was that the ministers had declined this trust; but at all events that, having regard to the length of time they had exercised the patronage, they ought now to be deemed to be the sole lawfully constituted administrators:

And, secondly, that the *Alexander* fund ought to be merged in, rather than separated from, the General Hospital fund. The minister of the city lodged a claim to participate in the exercise of the patronage. The First Division, on the 20th of July, 1875, pronounced the following interlocutor:

Find that the funds mortified by Master *James Alexander*, in the year 1695, have been hitherto held, administered, and applied by the Petitioners, in the same way as the funds belonging to the *Trinity Hospital*, and have been immixed with, and dealt with as part of, the funds of the said hospital; Find that, in terms of the said *James Alexander's* mortification, the funds mortified by him fall to be held and administered by the lord provost, magistrates, and council of the city of *Edinburgh*, and the ministers of the said city, present and to come, and to be applied, in the first place, in relief of poor persons of the founder's kindred; in the second place, in relief of poor persons of the name of *Alexander*; and lastly, in relief of other poor persons, all as directed by his deed of mortification, dated the 23rd of October, 1695: Find that for this purpose it is necessary to ascertain the present amount of the capital of the said funds mortified by the said *James Alexander*, and to set apart the same, to be administered and applied as aforesaid: Find that, in the year 1700, the said funds amounted in all to £2270, and that the said funds to that amount have been immixed as aforesaid with the funds and property of the *Trinity Hospital*, from an early period down to the present time, and must be held to have participated proportionately with the said funds and property in the increase of value of the aggregate funds and property, between the year 1700 and the year 1873: Remit of new to Professor *Macpherson* to ascertain the value of the whole funds and property of the said hospital as in the year 1700, drawing back to the said date the value of all additional gifts and legacies received by the hospital after the year 1700, on such terms as may seem reasonable, also to ascertain and fix the amount or value of the whole aggregate funds and property as in the year 1873, and to report what is the present amount of the said *Alexander* fund, taken in the same proportion to the present value of the whole aggregate funds as the sum of £2270 bears to the value of the whole hospital funds and property in 1700, ascertained as aforesaid. . . . . *Quoad ultra* approve of the recommendations of the reporter, and remit to him of new to prepare a scheme for the administration of the *Trinity Hospital* and its funds and estate, and also a separate scheme for the administration of the *Alexander* mortification, &c.

Subsequently the Court of Session further considered the mode in which the principle of accounting, which had been determined upon by the above interlocutor, should be carried out. And on the 19th of March, 1878, they pronounced an interlocutor allowing certain deductions, but finding, *inter alia*, that all lands purchased between 1700 and 1873 should be included in the valuation of the aggregate hospital property. The result of the two interlocutors worked out in figures would be that the *Alexander* mortification is entitled to be credited with a capital sum of £30,537 19*s.* 10*d.* out of the aggregate funds.

Against these decisions the lord provost, magistrates, and town council of *Edinburgh*, appealed to this House.

Mr. *E. E. Kay*, Q.C., and Mr. *M'Laren* (of the Scotch Bar), for the Appellants, contended that the finding of the Court below had no foundation in fact. The main increase in the hospital funds had arisen from the purchase of the lands known as *Blinkbonny* and *Dean's Park* in 1734; but at that date the *Alexander* fund was wholly invested in the original securities, and were so until 1744; this fact alone took away the basis of the judgment below, namely, that the funds were immixed since 1700. Certainly after 1744 and 1753, when the capital sums of the *Alexander* fund were paid up, they were mixed with other moneys and lent to the city, but the identical sums forming the *Alexander* fund had always been traceable, and not one farthing of them had ever been laid out on the purchase of land. The terms of the trust were that the interest—failing the preferred classes—was to be applied for the benefit of indigent persons generally, but that was also the object of the *Trinity Hospital* charity; therefore there would have been no advantage in keeping a separate account of disbursements, so long as none of the preferred classes were refused admittance; and of that there was no evidence. Finally they submitted that the funds had not been improperly mixed, and the *Alexander* fund ought not to participate in the present value of lands which in fact belonged exclusively to *Trinity Hospital*.

The ministers of the burgh had lost all right to jointly administer the fund, by long contrary usage. They relied on *Baird* v. *Magistrates of Dundee* (1); *Leslie* v. *Black* (2); also cited

(1) Court Sess. Cas. 3rd Series, vol. i. (H.L.) p. 6, and 2nd Series, vol. xxiv. at p. 447.
(2) 9 June, 1814; Fac. Coll. vol. xvii. p. 641.

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Magistrates of Aberdeen v. *University of Aberdeen* (1); *Attorney-General* v. *Dean of Christ Church* (2); *Attorney-General* v. *Caius College* (3); *Attorney-General* v. *Drapers' Company* (4); *Attorney-General* v. *Corporation of Exeter* (5); *Lewin* on Trusts, 5th ed. pp. 645, 647, 648.

The *Lord Advocate* (Right Hon. *W. Watson*), and Mr. *B. Nicolson* (of the Scotch Bar), were heard in support of the decision of the Court of Session. They intervened by virtue of the *Trust (Scotland) Act*, 1867, s. 16, and maintained that, ever since the Appellants had obtained possession of the *Alexander* mortification, they had acted when investing as if doing so for the benefit of the whole aggregate funds. For more than 150 years they had dealt with the fund as part of the aggregate charity funds; and on no principle of law or equity could they now say that the *Alexander* fund was severally administered. The fact that this fund was locked up in bonds at the date of the purchase of *Blinkbonny* and *Dean Park*, did not avail the Appellants; it was not necessary that the bonds should be reduced to money in order to participate in the advantage of the purchase.

Mr. *Kay*, Q.C., in reply.

The Law Peers having taken time to consider their judgment delivered the following opinions:—

LORD BLACKBURN:—

My Lords, the town council of *Edinburgh* were the administrators of *Trinity Hospital*, and as such held considerable funds before the year 1696. In that year Mr. *James Alexander* died, having previously made a mortification to the lord provost and town council of *Edinburgh* and their successors in office and the ministers of the said borough present and to come. The ministers at that time did not take any steps to assert their right to join in administering this mortification. The council got possession of the funds, and from the time they did so down to the making of the interlocutors appealed against, administered those funds as if

(1) 2 App. Cas. 544; affirming Court Sess. 4th Series, vol. iii. p. 1087.
(2) Jac. Rep. 474.
(3) 2 Keene, 150.
(4) 4 Beav. 67; 12 L. J. (Ch.) 421; and 6 Beav. at pp. 386, 390.
(5) 2 Russ. at p. 54.

they had been mortified to them as administrators of the funds of *Trinity Hospital*.

In a suit for the proper administration of the funds of *Trinity Hospital* the Court of Session had to decide a great many questions. Two, and two only of their decisions are now by this appeal brought before this House:—1. The Court of Session decided that the funds of the *Alexander* mortification ought to have been from the beginning administered by the council and the ministers, and not by the council alone, and that, notwithstanding the length of time during which a contrary practice had prevailed, they could not sanction it in future; and that the funds of that mortification must be in future administered, in terms of the mortifier's trust, by the council and the ministers. This was the first decision appealed against. I think none of your Lordships who heard the argument doubted that the Court of Session could not have decided otherwise, and the counsel for the Appellants were not able to urge anything substantial against this decision.

But then, having determined that the *Alexander* fund was to be administered separately in future, there arose a question what was the fund which was to be so administered. I do not think that I can state the point more briefly than is done by the Lord President. He says:

> The funds left by Mr. *Alexander* were invested in particular securities, and those securities were not called up or changed until about the middle of the last century, and we have distinct evidence of what the amount of the fund was at that time. Now, if we proceeded upon the principle of a strict accounting against the magistrates here as trustees, of course the way of bringing out the balance would be to charge them with this capital, as at the date when we find it in their hands, and then charge them with the income as it accrued, and let them discharge themselves the best way they could. But it rather appears to me that, in a case of this kind, and looking to the nature of the trust and the way in which it was necessarily administered, that would be too strict a principle of accounting, and while I think it is our undoubted duty to separate this *Alexander* fund, and secure that it shall be administered as a separate trust in all time coming, we may deal with bygones in a way more favourable for the administrators of *Trinity Hospital*. The income of the fund has apparently been spent, and it has not been spent, so far as we can see, upon purposes alien to the intentions and wishes of the founder. His wishes and intentions have only been to a certain extent disregarded, that is to say, the fund has not been in the right hands of administration, and there has not been in the selection of the objects of the bounty that order of preference which he desired. But still the fair result of the evidence appears to be that, at all events for a very long period, the income of the *Alex-*

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ander fund was bestowed upon poor and indigent persons of the kind generally here contemplated. It was employed, along with the income of the other funds of the hospital generally, for such purposes; and therefore I cannot see that there can be, especially against a shifting body of trustees like the magistrates and town council of *Edinburgh*, any responsibility for the expenditure of that income. It is not alleged that they appropriated this fund to their own purposes as individuals, or that they appropriated it to the uses of the corporation of the city of *Edinburgh*. If that had been so, it would have raised a question of a very different kind. But that does not appear to have been so, and therefore I incline to the opinion that, in so far as regards the past income of this fund, there is no room for any accounting at all.

But then the next question comes to be—How are we to ascertain what sum now in the hands of those trustees will adequately and fairly represent the capital of the *Alexander* fund? Now that is a question of some difficulty, but at the same time I think it admits of a solution. We know that the *Alexander* fund was invested upon two bonds, as it was originally settled by the donor himself—the one upon the *Annandale* estates for £1725 17*s.* 8½*d.*, and the other upon the *Westerhall* estates for £544 13*s.* of sterling money; for I am speaking now of the amount as converted into sterling money and actually paid up in the course of last century. These two sums amount together to £2270. Now the mortification was in the year 1695, and it may certainly be assumed, without any great stretch, that that money came into the hands of the hospital trustees by the beginning of the last century, say in the year 1700. Therefore they were possessed in 1700 of this capital sum as representing the *Alexander* mortification. They were at the same time possessed of a very considerable estate belonging to the hospital, and it is not at all difficult to ascertain what the amount of that estate was. In that way we discover what was the relative or comparative value of those two estates in the year 1700. But it is very apparent upon the face of the report before us, and the abundant information which we have on the subject, that this joint mixed estate, consisting to a large extent of the funds and estate of the hospital proper, but also to a more limited extent of *Alexander's* fund, has largely increased in amount and value between the year 1700 and the present day. Now it seems to me that this estate so jointly administered having greatly increased in value between those two dates, the *Alexander* fund must be entitled to participate in that prosperity. Thus, supposing that in 1700 the estate of the hospital proper amounted to £10,000 in value, and the *Alexander* fund to £2000 in value, making together £12,000, but that at the present day the joint estate, as it appears in the hands of the administrators, amounts to £50,000 in value, then that £50,000 must be apportioned between the same funds in the same proportion that they bore to each other in the year 1700; that is, as 10 to 2. I am taking the figures I have mentioned as entirely suppositious, not supposing they represent the entire value by any means. On the contrary, the value as we see is very much greater. Now there may be some little difficulty in adjusting the precise way in which this result is to be brought about.

He then proceeds to give various directions as to what was to be done in ascertaining the amount, which I need not further notice.

No other way was suggested at the bar in which the fund, if the two were inextricably mixed up, could be apportioned except that of taking the proportion which the two funds bore to each other, and dividing the mixed fund in that proportion; and I cannot myself see any other way. But it was argued that the two funds were not inextricably mixed up. And the point which the Appellants' counsel made was fairly raised by the facts as to the purchase of the *Dean* estate. It appears that the town council in 1734 purchased this estate for £3675. In course of time that estate has become part of the town of *Edinburgh*, and is now worth a very large sum of money, and this has been a very profitable investment. At dates subsequent to 1734, they invested funds in city bonds, and, the city having become insolvent and compounded with its creditors, this has been a losing investment.

The decision of the Court of Session is that the investments are to be taken as made for the mixed funds, and that on the figures supposed by the Lord President the *Alexander* fund is entitled to two-twelfths of the profit made by the profitable investment in the *Dean* estate, and is to bear two-twelfths of the loss on the unprofitable investments in city bonds. And the result of that will be that in administering the *Alexander* fund the administrators will have the management of a very considerably larger sum than what the testator *Alexander* had and mortified in 1695. The contention of the Appellants is that the investment in the *Dean* estate is to be considered as made exclusively for the benefit of *Trinity Hospital*, and that the *Alexander* fund will have no share in the profitable investment, but will have to bear a share of the loss on the subsequent investments, so that the fund now to be administered as the *Alexander* fund will be less than what the mortifier left in 1695. This is a result which does not at the first view seem so fair and just as that produced by the decision of the Court of Session.

In order to understand the grounds on which their argument is based it is necessary to examine what the facts were.

The testator *Alexander* left in 1696 the funds available for his mortification invested in two bonds. The administrators of *Trinity Hospital*, by usurpation, became possessed of the control of both those bonds before 1734, and they in fact received the interest on

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those bonds and mixed the interest thus received with the revenue which they received from the property of *Trinity Hospital*, and from that mixed revenue defrayed the expenses which they incurred for the whole charity, without making any distinction whatever as to whether those expenses were incurred for objects proper under the terms of the *Alexander* mortification or for purposes proper under the *Trinity Hospital* charity only. This is clearly proved by the account for the year 1722, which was in process, though not printed, and which was produced at the bar during the argument. No doubt this was wrong; but, as pointed out by the President in the passage I have read, these purposes were not alien to each other, and, though wrong, this was not a wrong like what it would have been if they had appropriated it to their own purposes. But though they treated the funds as one the two bonds remained in in specie just as *Alexander* left them, not called up.

When the council were completing the purchase of the *Dean* estate in 1739, they gave directions to their treasurer to pay for improvements upon it, and for that purpose to uplift some securities, including the bond over *Westerhall* for £544 13*s.*, which was one of the bonds left by *Alexander*. Nothing could more clearly prove that in making the investment the council were (as far as intention went) intending to make an investment for the behoof of the whole mixed fund, which they, improperly it is true, treated as one fund. But the treasurer did not follow these instructions. In his account, after shewing what the whole disbursements in paying for the *Dean* estate and improvements on it had been, and that there remained a balance of £465 18*s.* 5*d.* unpaid, he adds this:—

	£.	s.	d.
"Tho the accomptant was authorised by the council to uplift £544 13*s.* st. contd. in Sr. *James Johnston's* hereble bond to the hospital to replace the above charge which, as it was well secured, and the interest duly paid, he judged it more for the interest of the hospital to uplift only the sum due by Mr. *John* and Mr. *Charles Cockburn*, their bond being £200 stg., and the meantime to advance the rest himself, ...	200	0	0
"Balance due to him on acct. of the inclosing	265	18	5"

Consequently the two bonds remained in specie not called up for some years later. The argument founded on this was, that as

the bonds remained in specie and earmarked as it were, and as it appeared that the estate of *Dean* was in fact paid for out of funds originally belonging to *Trinity Hospital* and uplifted for that purpose, it followed as a matter of law that, whatever the council intended, the funds must be followed, and that the *Dean* estate belonged exclusively to *Trinity Hospital*. According to this reasoning, if the treasurer had obeyed his instructions the *Alexander* fund would have been entitled to share in the *Dean* estate in the proportion which £544 13*s*. bore to the whole cost. As he did not they are to have no share in it.

This makes the question depend entirely on an accident, and is not a satisfactory result, still if the law was settled that it was so we must follow it. But I do not think there is any case, either in *England* or *Scotland*, in which such a question has been raised.

No doubt when the question has been whether those who represented the trust could claim property on the ground that it was procured by trust funds which they had a right to follow, the identity of the fund is all important. But such a case as the present as to an investment has never, that I can find, been raised.

In *Pennell* v. *Duffell* (1) it might have been raised, but those entitled to the different estates which then were proved to be jointly entitled to the fund very sensibly settled the proportions in which they were entitled without going to law about it.

Being therefore, as I think it is, a new question, it must be settled on principles of justice. Speaking for myself alone, I should have had great difficulty in deciding this case if it had come before me as sitting in the Court of Session. I doubt whether I should have had acuteness enough to discover the mode in which the Court of Session have solved the difficulty. But they have solved it in a way perfectly consistent with justice and good sense, and not inconsistent with any technical rule of law, and no other solution has been suggested which would be so satisfactory. I certainly, therefore, am not prepared to advise your Lordships to reverse the judgment below, especially seeing that I am not prepared to advise your Lordships to adopt any other rule.

I move, therefore, that the interlocutors below should be affirmed, and the appeal dismissed with costs.

(1) 4 De G. M. & G. 372.

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LORD HATHERLEY :—

My Lords, I have had the advantage of seeing in print the opinion of the noble and learned Lord who has just addressed your Lordships, and I have nothing to add to the statement of facts therein contained.

It appears that the first unfortunate step which was taken in this matter, erroneously, although no doubt in perfect good faith, was the exclusion of the ministers who were particularly pointed out in *Alexander's* mortification to be joint trustees with the corporation of *Edinburgh* of the fund that he left for the purposes, under certain limitations, of *Trinity Hospital*. The ministers being shut out from it, the fund was administered entirely by the provost and council of *Edinburgh*. This circumstance, no doubt, led to the confusion which afterwards took place in the accounts. The provost and council of *Edinburgh* were properly trustees of *Trinity Hospital*, and they had several other mortifications also which were made over to them for *Trinity Hospital;* and this *Alexander* mortification appears in a sense to have been one also for the benefit of *Trinity Hospital*, or rather for the benefit of the persons who were to be received therein, that being a charity. It was limited, however, in its operation by certain rules with reference to the kindred of the founder. He was particularly anxious that those kindred should be admitted to it, and that until they failed, the fund should be used for that purpose. However the provost and council of *Edinburgh* placed all those funds which they held in any way for the benefit of *Trinity Hospital* in one common stock, as it were, and kept one common book of accounts with relation to them.

I asked once or twice during the argument whether there was any separate account kept anywhere of the *Alexander* mortification, and was answered that the report of Mr. *Macpherson* was in this respect perfectly correct; that the funds of the *Alexander* mortification had been "immixed" with the other funds held by the corporation in trust for the hospital. The consequence of that was that all the funds, including the *Alexander* mortification, have been dealt with as one common fund to be administered, as the provost and council might think proper, for the benefit of the hospital. This is not a case, as was remarked in the Court below, and as has been remarked again just now by my noble and learned

friend, in which any improper motives have actuated the corporation, that is to say, the provost and council of *Edinburgh*, as trustees. They no doubt thought that they were performing their duty in doing that which they did; but at the same time the consequence has been unfortunate, because it has become necessary to separate these funds which are held on separate and distinct trusts; and, it being necessary to separate them, the question is how is that to be done now, when, according to the report of the referee, Mr. *Macpherson*, the funds have become inextricably immixed? My Lords, a very hard struggle was made, by Mr. *Kay* I think, upon that part of the case, namely, with reference to the funds being capable of being still pointed out as separate and distinct. Now up to a certain time there was truth in this. The corporation became masters of the fund, as it is stated, about the year 1700. As far as appears from the report or the evidence they were at that time masters of the fund, which consisted of two heritable debts due from the *Annandale* estates and another estate connected with them, the separate sums amounting together to the sum which was mentioned in my noble and learned friend's statement. Those debts were not gathered in until certainly after the year 1734 or 1735, in fact not until after 1740, and the purchase of the *Dean* estate was made at a period anterior to their being so called in, but the interest on those bonds was received and was credited to the common fund before that time. We have had an opportunity of seeing the accounts for one year, and it appears that the payments were made entirely in a mixed and unseparated form, indifferently from the interest of one fund or the other, or from the interest of one or of all the funds which were held by the provost and council of *Edinburgh*. My Lords, that being the case, it became impossible from that time to separate the interest, as Mr. *Macpherson* tells us, and of course we looked to the counsel for the Appellants to make out if they could that Mr. *Macpherson* was wrong in that respect, and that the interest could in fact be separated. No attempt, however, has really been made, or if it has been made it has not been successful, to shew that the interest of these funds was at any time kept separate and distinct. In due time afterwards the capital was gathered in, and what became of it? It may partly be traced to the debts which pressed upon the corporation I apprehend, and it may

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partly be traced for a certain time to certain other payments; but after a time the funds became so inextricably immixed that there is no mode of separating them.

The Appellants say, "At all events, the corporation did not take the funds of the *Alexander* mortification for the purchase of the *Dean* estate, which is a source of profit to the corporation, they did not use them for the investment in this *Dean* estate, which has turned out well for those who engaged in it, and we must keep these funds entirely separate from that advantageous purchase, inasmuch as we can shew you that the identical funds which might be followed out as being what you were entitled to, could not possibly have been laid out in the purchase of the *Dean* estate. In the events which have happened it would certainly be very much worse for them if they were taken to be left in the general body of the fund, and so lost. What the Court seems to have regarded the corporation as having done may be described thus; if I may use an expression which bears more analogy to this than any other expression one could use, a sort of partnership was formed by these trustees between the various trust funds which they held. They considered that they were justified in acting in the manner they did for the benefit of the hospital. They said, We will carry all these into one joint stock concern for better and for worse; and accordingly, although there have been some alternations, the investment which was made by these trustees, improperly constituted in a sense, but still trustees of this particular fund, has turned out to be a beneficial investment.

Now, my Lords, I apprehend that what the Court below has done is only that which is commonly done in this country with reference to partnerships. The question came more frequently before our Courts at one time than it does now, because the principle is better understood. At one time—a long time ago—if a partner died leaving assets in the partnership, and the other members remaining in the partnership after his death carried on the business with his assets, there was felt to be a difficulty in coming to any arrangement as to what would be the correct mode of dealing with that fund. It was a recognised rule at all times that a *cestui que trust*, whose property has been improperly dealt with, has the choice of accepting the dealing with his property or repudiating it; that is, either of taking all the profit (he would

not choose it, of course, if there had been loss) resulting from the dealing with his property, or requiring the payment back of his money with such interest as the Court thought right under the circumstances. There was found to be a difficulty about applying that to partnerships for some little time, but the principles of partnerships were discussed in the cases of *Brown* v. *De Tastet* (1), and in the case of *Wedderburn* v. *Wedderburn* (2). When the principles were discussed in those cases it was said that the difficulty having arisen in this way, inasmuch as something must be allowed for labour and attention and activity in the business, such remuneration, for instance, as the managing partner or a person somewhat in that position might be entitled to—the Court did not see its way to direct a simple account of the profits without more. However, in those cases it came to be settled at last that the proper course is to allow an account of all profit made since the death of the partner, and to give his estate a share of that profit according to the capital on the one side, and to debit his estate on the other side with "just allowances," which of course includes everything which the Court might think just and proper. The principle was that the trust money having been used in the partnership concern, and profits having resulted from that use of trust money, no attempt should be made to separate all the different funds out of which money might have been paid but the share of profits upon the trust money so used was to be ascertained according to the capital employed.

That, my Lords, is exactly what has been done here. It is a kind of partnership concern which has been carried on by the provost and council with their various trust funds. The whole of the trust has made a profit, that profit the Court below has held ought to accrue for the benefit of that charity the funds of which came into the hands of these trustees about the year 1700, as far as can be made out upon the evidence, as well as of the other trust funds held by the same trustees. That is the principle upon which the Court has directed that the apportionment should be made.

Now, my Lords, in the case of a partnership, supposing it were necessary to lay out any money for the purpose of increasing the business during the time when the business was carried on with

(1) Jac. 284. (2) 2 Keen's Rep. 722, affi. 4 Mylne & Craig, 41.

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the aid of the deceased partner's assets in conjunction with other assets of the partnership, supposing it was necessary for the erection of a new building—take a brewery, for example, or the like—to make payments, and profits were so earned, the Court would not be very strict to inquire out of which particular fund the money which was laid out arose, because when funds are employed jointly in this way you can hardly say that payments are made out of one fund rather than out of another fund. Here, curiously enough, there is a strong illustration of that in the entry which has been read by my noble and learned friend near me, from which it appears that it was actually intended at one time to apply these very funds to the particular purchase which was made of the *Dean* estate. But really, that does not in substance make a difference if the whole concern has been carried on in a joint and mixed manner, if the whole funds have been invested for the purposes of the whole concern, if I may so term it. Believing, as the corporation did, that the whole was one concern, it was upon the faith and confidence of their having certain assets in hand, of which the heritable bonds in question formed part, that they made the purchase which otherwise they would not have ventured to make for the benefit of the trust; any more than, if it had been an actual partnership, the partners would have ventured to make such a purchase for the benefit of the partnership unless they had funds in hand.

Now, my Lords, from about the year 1700 the provost and council have had these £2000 odd of the *Alexander* mortification, and the interest upon it was at first very punctually paid, as the entry which has been read shews, although afterwards the state of things was different. The question arises after a long series of years in which this mistake has been made, for a mistake it has been held by the Court below to be, and that can hardly be disputed. The result of this long mistake is that happily, as things have turned out, the whole concern of this trust administered as one concern has been fortunate, the *Alexander* mortification partook in a speculation for which the funds of the concern were used, and it has been held by the Court below to be entitled to an equitable share of the profits so realized; that is what it comes to. I have taken the *Dean* estate as the principal instance, because that appears to be the principal instance of profit; but that is not

the only instance, or the only instance of profit, it is a salient instance. A *cestui que trust* has a right, when his fund has been dealt with in an illegitimate manner as regards the true legal construction of the bequest, to say at his option whether he will have a decree for the restoration of the fund with or without interest in the meantime, or whether he will take the result of the employment of that fund when it has been employed together with other funds in a payment resulting in an acquisition of profits by taking a share of those profits. The remedy is given to him in either case on account of the impossibility, when funds have been mixed, of attributing to each a particular property, and earmarking it as belonging to the one rather than the other. And although you may say at such and such a time the *Dean* estate in particular could not have been bought with this particular fund, because these bonds were not then gathered in and collected, still the interest had been gathered in, and the interest had been applied, as Mr. *Macpherson* says, in ease of the other funds to some extent. He says they were sometimes in excess, and sometimes in deficiency; at all events, at certain times they were in excess. It was one common fund, and the *cestui que trust* does not now ask to have his part of that fund followed and pursued, and to have his trust moneys divided from the rest, but he asks what common justice seems to require, namely, that he should have a right to participate in that which has followed from the use of his money together with the other moneys, taking his share out of that joint and common stock. I think the *cestui que trust* has a right to do that.

My Lords, I will only add to what my noble and learned friend has said that in this decision I think we are in no way departing from, on the contrary, it approves itself to my mind as a way of carrying into full effect, the rule which is common in cases of this kind, namely, that a *cestui que trust* whose funds have been dealt with without his consent has a right to take the result of that dealing in the manner most favourable to himself. I think, therefore, my Lords, that the order suggested by my noble and learned friend is the correct order for us to make.

LORD GORDON:—

My Lords, in regard to the first question raised under this appeal, viz., whether the ministers of *Edinburgh* are entitled

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to participate in the administration of the *Alexander* mortification, I entertain no doubt at all. The terms of the deed of mortification are quite distinct and unambiguous. It nominates and appoints the "Right Honourable the Lord Provost and bailies and council of *Edinburgh*, and their successors in office, for the community thereof, and ministers of the said burgh, present and to come, to be the sole and undoubted patrons" of the mortification. The ministers of the burgh "present and to come," are appointed, equally with the lord provost, bailies, and council, and their successors in office, patrons of the mortification, and I entertain no doubt that the ministers were entitled from the institution of the mortification to participate in its administration.

But it is said that, as the ministers have not taken part in the administration of the mortification from its institution in or prior to the year 1700, they have now lost their right to participate in the management. I think this is a mistake. I agree with the Lord President that "the circumstance that the ministers of *Edinburgh* have never claimed to be conjoined in this administration is of no consequence. No persons of an official character can give away the rights of their successors in office under a trust of this kind, and therefore the trust must be constituted and administered now as provided by the truster in his deed of mortification."

I think that the cases of *Baird and Others* v. *The Magistrates of Dundee* (1) and *Leslie* v. *Black* (2), which were relied on by the Appellants, are inapplicable to the circumstances of the present case. In *Baird* v. *The Magistrates of Dundee*, the mortification was in favour of the provost and bailies of *Dundee*, but from the institution of the trust in 1845 the affairs of the mortification were managed, not by the provost and bailies alone, but by the provost, bailies, *and town council*. And it was decided by this House in 1863, when the question was raised, "that, having regard to the length of time during which the provost, bailies, and town council of *Dundee per se* administered the charity, they ought to be considered as the lawful trustees of the interest represented by *Johnstone's* legacy." The case of *Leslie* v. *Black* did not come to your Lordships' House. But the point decided by that case was that where a minister and members of a kirk session

(1) Ct. Sess. Cas. 3rd Series, vol. i. (H.L.), p. 6; 2nd Series, vol. xxiv. p. 447.
(2) 9 June, 1814, Fac. Coll. vol. xvii. p. 641.

who were appointed, along with others, as patrons of a mortification had, for more than a century, voted collectively as one person in the administration of the trust affairs, they were not entitled to vote *per capita*, but must continue to vote as they had formerly done. In both of these cases the question was in regard to the intention of the testator, and the usage was only important as shewing the contemporaneous interpretation put on the terms of the deed of mortification accepted and acted on for long periods of time. But there is nothing in these cases to indicate that in a case such as the present, where there is a clear and distinct nomination of certain official persons to act as patrons, the failure for a length of time of these officials to perform their functions would deprive their successors of the rights so distinctly conferred upon them.

The remaining part of the case in regard to the mixing of the funds of the *Alexander* mortification with those of the *Trinity Hospital* and the proper mode of the separation of these funds is attended with more difficulty. But on a careful consideration of the whole matter I have come to be of opinion that the result arrived at by the Court of Session is right. I have had an opportunity of perusing and considering the judgment which has just been delivered by my noble and learned friend Lord *Blackburn;* and as his Lordship has gone fully into that part of the case, and as I concur in the views which he has expressed, I shall not detain the House by entering on details.

I am of opinion on the whole matter that the judgments of the Court below are right, and that they should be affirmed.

Interlocutors appealed against, affirmed; and the appeal dismissed with costs.

Lords' Journal, 21st July, 1879.

Agents for Appellants: *J. & J. Graham.*
Agent for Respondent: *T. B. Simson* (Crown Agent).

END OF VOL. IV.

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COPYRIGHT—*continued.*

the music of the opera, and also of the "arrangements." He sought to register them in *England*. He filled up the statutory forms required for that purpose. One column of those forms had, in the lower portion, the heading, "Time and place of first representation," and the words, "*Théâtre Impérial de l'Opera Comique, Paris, France*," 10th March, 1867," but the upper portion of the same column had the words, "Time and place of first publication," under which were the figures and words, "28th March, 1869. 10, *Rue de la Chaussée d'Antin, Paris, France*." The form relating to the assignment of the music of the opera was correct in the first two columns, but in the third, under the heading, "Assignee of copyright," were, first of all, the name and residence of *B.*, and then the words, "as assignee of the copyright in the music of the *said book*, and also of the right of publicly performing such music." The written but unpublished music of the opera was not deposited at *Stationers' Hall:* the "book" containing the pianoforte arrangements was deposited there. *F.* produced a dramatic representation calling it "*Vert-Vert*, music by *Offenbach*," the music being taken from the "arrangements," but the words were supplied by English writers:—*Held*, that there had been a sufficient registration of the music of the opera, that this registration was not affected by the reference to the "book" of the arrangements, and that *F.* had been guilty of an infringement of *B.*'s rights. Fairlie *v.* Boosey [711

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certain vessels, his services were retained by the proprietor of ship *U.;* that he was getting ready to take command thereof when he found that the Defendant insurance society had intimated to the said proprietor that if the Plaintiff were to take command of her the society would refuse to continue to insure her; that he then took certain steps in order to induce the society to reconsider their resolution or to give him an opportunity of refuting the reasons they might have for it, but in vain; that by reason of this proceeding on the part of the society he had lost his employment, and that this arbitrary and vexatious conduct on the part of the society caused him considerable damage in depriving him of his employment, and consequently of the means of providing for and maintaining his family—praying that the conduct of the society might be declared illegal, arbitrary, and vexatious, and that they might pay damages £500.—Plea in effect that the Defendants acted upon information which they believed to be true that the Plaintiff was addicted to intemperance, that they communicated their refusal to insure, but not their information, to the shipowner, that they did so in good faith, and without any malice towards the Plaintiff, without any desire to injure him, and in the honest belief that the information they had received was sufficient to justify the course which they took:—*Held*, that such defence (if proved) was a sufficient answer to the *primâ facie* cause of action disclosed by the declaration. The representation made by the Defendants was clearly one made in the conduct of their own affairs and in matters in which their own interest was concerned:—*Held*, further, that such defence was established by proof that the Defendants had received such information, and had reason to believe it to be true, without conclusively establishing habits of intemperance against the Plaintiff as upon a plea of justification. Hamon *v.* Falle - - - - - - 247

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EXECUTOR—*Compromise by Executors of Debt due by one of themselves—Fraud—Settlement in Account—Liability of Executors.*] *A. C.*, being one of several executors, a debtor to his testator's estate in the sum of £20,130, and entitled to one-sixth of the said estate (estimated at £6000) as legatee under the will, agreed with his co-executors, in accordance with the terms of the will and without objection from the parties interested, to set off the said £6000 against the like amount of the debt then payable by him, at the same time paying about £1000 in cash. Thereafter having become insolvent, *A. C.* agreed, by way of compromise with his creditors, including the said

EXECUTOR—*continued.*
executors, that they should accept 5*s.* in the pound in full of their demands, secretly arranging with some of the said creditors to pay to them further sums if he should be in a position so to do, and subsequently paying to them, or some of them, further sums. For the purposes of the compromise the debt due to the testator's estate was treated by the executors as amounting to £19,808, thus in effect reviving the debt of £6000 which had been previously discharged, and accepting in respect of it a composition of 5*s.* in the pound; and the executors also treated as revived *A. C.'s* right to one-sixth of the testator's estate.—In a suit brought by a legatee against the executors, all of whom proved the will, *held*, that the above agreement of set-off extinguished *A. C.'s* debt *pro tanto*, and had the same effect as if *A. C.* had paid £6000 in cash. It also extinguished *A. C.'s* right under the bequest, unless it should turn out that the one-sixth share exceeded the estimated £6000, and subject to his liability to refund *pro tanto* in case the same should fall short of the estimated £6000.—*Held*, also, that the agreement of compromise was a breach of trust and void as against the Plaintiff, and that it was fraudulent as regards *A. C.* The secret arrangement, though not legally binding, was sufficient to vitiate the compromise.—*Held*, further, that whether or not a compromise by executors of a debt due from one of themselves will be excused and upheld if beneficial to the estate, the above compromise and the mode in which it was carried out as above were injurious to the estate and to the Plaintiff, and that the Plaintiff, in the absence of any consent or acquiescence by him, was not bound thereby.—*Held*, further, that *A. C.* was liable to the estate for the full amount of what would have been due and payable by him if the compromise had never been effected, and that the co-executors were severally liable for so much of the said amount as would or might at any time have come to their hands but for their wilful neglect and default.—It is not necessary to direct an inquiry previous to charging the Defendants as for wilful neglect and default.—The executors having been directed by the will to sell the real estate, if they allowed one of their number to hold stores and buildings at less than a fair occupation rent, are chargeable with what would have been a fair occupation rent.—A house and premises having by the will been given to the widow for life without impeachment of waste, an inquiry was directed whether any charge for money expended thereon by the executors ought to be allowed or not, having regard to the circumstances under which the expenditure was made.—Interest on sums decreed allowed at 6 per cent.
DE CORDOVA *v.* DE CORDOVA - - - 692
—— Testator of shareholder in unlimited company - - - - - 583
See SCOTCH LAW. 7.

EXPERTS—Committee of—Trade-mark - 479
See TRADE-MARK.

FALSE REPRESENTATION—*Implied Liability of Vendor of Goods—Statute.*] A man may be morally, and, under the terms of an Act of Parliament, legally culpable, and yet his conduct may not give any right of action to a private individual who suffers injury thereby.—A breach of a statutory duty may not constitute the foundation for a private right of action.—A statement that the purchaser of an article must take it "with all faults," and that the vendor will give no warranty with it, and will refuse all future claim for compensation (where the vendor does nothing to conceal defect), relieves the vendor from all liability in respect of any defect in the article itself.—*Per* Earl *Cairns*, L.C.: If such a statement was followed by a declaration of the vendor (who knew the reverse) that he believed the article to be free from objection, there might be ground for an action of deceit.—Where a statute prohibited persons from sending animals affected with a contagious disease to market, and inflicted penalties on any person so sending them, the act of sending them, if known to be so infected, was a public offence, but did not amount by implication to a representation that they were sound, and did not of itself raise, as between the vendor of the animals and the purchaser of them, any right on the part of the purchaser to claim damages in respect of an injury he had suffered in consequence of their purchase.—*Per* Lord *O'Hagan*: The statute in such a case was passed for the benefit of the general public, and had nothing to do with the private bargains of individuals. WARD *v.* HOBBS [13

FEU—Subdivision of - - - 87
See SCOTCH LAW. 15.

FORESHORE—Property in Scotch barony 770
See SCOTCH LAW. 14.

FRAUD—Executor—Compromise of debt 692
See EXECUTOR.

FRAUDS, STATUTE OF - - - 311
See VENDOR AND PURCHASER.

HIGHWAY — Nuisance — Liability of municipality—*New South Wales* - 256
See NEW SOUTH WALES, LAW OF. 1.

IMPLICATION—Representation - - 13
See FALSE REPRESENTATION.

INCLOSURE—*Inclosure Act—Paths and Ways—Effect of Award.*] The words of the 68th section of 8 & 9 Vict. c. 118 (the *General Inclosure Act*) are positive that all roads and ways not set out by the valuer on making his award, "shall be for ever stopped up and extinguished."—*H.* was possessed of lands in a neighbourhood where the *General Inclosure Act* was about to be applied. He sold some of these lands to *T.*, expressly reserving to himself the allotments that might afterwards be made. The conveyance to *T.* contained the usual words, "together with all ways, paths, passages, easements, privileges, advantages and appurtenances to the said land appertaining, or held, used, or occupied therewith." Between the lands purchased by *T.* and the high road there were certain wastes over which the former holders of *T.'s* lands had, for above forty years, enjoyed the use of certain paths and trackways—which were paths and trackways of convenience, but not of necessity. The wastes were allotted to *H.*: the valuer, to whom *T.* had not preferred

INCLOSURE—*continued.*
any claim of right to the paths and trackways in question, made his award, in which other paths and ways were set out, but not those from *T.*'s lands to the high road. Before the award was made *H.* had sold his interest in the allotments to *C.* who, after the making of the award, refused to allow *T.* the use of the ways in question:—*Held*, that by the effect of the award they had been stopped up and extinguished, and that the conveyance by *H.* did not bind him to grant new easements over any land he might acquire by the allotment. Turner *v.* Crush. - - 221

INSOLVENCY—Law of *Victoria* - - 156
See Victoria, Law of, 2.

INSURANCE — *Marine—Partial Loss—Value of Ship.*] A policy of marine assurance is not a contract of mere indemnity.—General average and salvage do not come within either the words or the object of the suing and labouring clause of a policy of marine assurance.—Salvage expenses are not assessed upon the *quantum meruit* principle, but on the general principle of maritime law, rewarding persons who by great, and perhaps dangerous, exertions bring in a ship, for which exertions, if not successful, nothing would have been paid.—The assured, who had not abandoned, but had elected to repair, after damage sustained from perils of the sea, was *held*, therefore, not entitled to recover under that clause the expenses of salvage.—But *held* that, up to the amount insured, he was entitled to recover the cost of repair, with the reduction of one third new for old, even although the amount, calculated upon that principle, should exceed the amount that would be payable upon a total loss with benefit of salvage, and should equal the whole sum insured.—The ship *Crimea* was insured with the Defendant for £1200, being valued in the policy at £2600. It encountered very bad weather, and was in danger of sinking: it was rescued by a steamer, which obtained from the Irish Court of Admiralty £800 as salvage money. The owner did not abandon, but elected to repair. The Defendant's proportion of the repair expenses amounted (after the deduction of one third new for old) to £1200, the full sum he had insured, and he was held liable to that amount; but was held not to be liable to any part of the salvage expenses.—There were cross appeals. Neither party was completely successful. No costs were given. Aitchinson *v.* Lohre - - - - - - 755

INTEREST—Legacies payable out of proceeds of land - - - - - 96
See Scotch Law. 16.

—— Bankers also mortgagee - - 413
See Banker.

INVALIDITY OF PATENT—Presumption 174
See Patent. 2.

INVENTION—Non-user of - - - 174
See Patent. 2.

ISLE OF MAN, LAW OF—*Customary Estates of Inheritance—Rights of the Crown—Minerals—Clay and Sand—Acts of Settlement.*] The Crown is not entitled to the clay and sand in the customary estates of inheritance in the *Isle of Man*. By the laws and custom of the Isle, the owners of customary estates of inheritance in customary

ISLE OF MAN, LAW OF—*continued.*
tenements of Lord's Lands have from time immemorial without the license of Her Majesty or her predecessors, Lords of the Isle, as of right dug, raised, and got the clay and sand therein, and have removed and used the clay for manuring their own and other lands, and for other purposes, and have converted it into bricks and tiles for sale. There is nothing in the history of the title to the Lordship or Manor of *Man*, and of the customary tenures, from which it is necessarily to be inferred that the above custom could not have had a legal origin; and it may be presumed from the existence of the custom, if nothing to the contrary appears, that it grew up with the tenures as one of their customary incidents. The saving clause in the Act of Settlement does not involve a negation of the custom nor override it:—*Held*, that the word "minerals" in that clause did not include clay and sand. Attorney-General for the Isle of Man *v.* Milchreest - - 294

JOINT CONTRACTOR—Judgment against one, a defence to action against another 505
See Partnership.

JUDGMENT—Against one joint contractor a defence to action against another - 505
See Partnership.

JURISDICTION—Court of Appeal—Case stated by sessions on *certiorari* - - 30
See Sessions.

LANDED ESTATES COURT — *Landlord and Tenant Act (Ireland)*, 1870 (33 & 34 *Vict. c.* 46).] *Semble*, that no appeal will lie to this House from the Landed Estates Court in *Ireland* upon any question of the amount offered for the purchase of an estate sold in that Court, or of the person who is the proposing purchaser.—The 33 & 34 Vict. c. 46, the *Landlord and Tenant Act (Ireland)* 1870, provides, ss. 46-47, that where an estate is to be sold in the Landed Estates Court, facilities shall be given to occupying tenants to become purchasers of their holdings.—*P.*, the trustee of an estate with full powers of sale, became the Petitioner for the sale of it in the Landed Estates Court. Many of the tenants desired to become purchasers of their holdings. Several meetings were held by the parties interested. *H.* offered £80,500 for the estate. Several of the tenants were not satisfied that his proposal contained arrangements sufficiently advantageous for them, and raised objections. Two persons, *L.* and *M.*, who appeared to act as representatives of the dissenting tenants, offered £81,000 (or £500 more) for the estate. Their arrangements as to the ultimate sales of the holdings to the tenants appeared to satisfy the tenants. Proceedings were had in the Court, in which *P.* and *H.* and *L.* and *M.* became formal parties. The tenants themselves were not parties to these proceedings. The Judge of the Landed Estates Court, after a full hearing, decided that the offer of *L.* and *M.* ought to be accepted. On appeal this decision was reversed, and the conveyance ordered to be executed to *H.* No appeal against that order was made by *L.* and *M.* Several of the tenants proposed to appeal against it in respect of matters relating to their own interests.—

LANDED ESTATES COURT—*continued.*
Held, that it was not competent to them to sustain such appeal; that as *L.* and *M.*, who were parties to the proceedings below, had not appealed, those who had put themselves under the guidance of *L.* and *M.*, but who had not been parties to the proceedings below, could not now constitute themselves parties for the purpose of raising an issue which had never been raised in the Court below. Walsh *v.* Pemberton - - - 737

LANDLORD AND TENANT—Landed Estates Act (*Ireland*) - - - 737
See Landed Estates Court.

LEASE—Charity—Void under 13 Eliz. c. 10 325
See Limitations, Statute of. 1.

—— Waste—Opening quarry - - 454
See Waste.

LEGACY DUTY—Effect of marginal note to will - - - - - 96
See Scotch Law. 16.

LETTERS—Contract by - - - 311
See Vendor and Purchaser.

LIBEL—Representation to Plaintiff's employer in course of business - - - 247
See Defamation.

LIABILITY—Executors—Compromise of debt
See Executor. [692

—— Trustees—Shareholder in unlimited company—Scotch banking company
See Scotch Law. 2—12.

LIEN—Broker—Policy of insurance - 1
See Principal and Agent.

—— Banker - - - - - 413
See Banker.

LIMITATIONS, STATUTE OF—*Charity Lands*—13 *Eliz. c.* 10—*Lease void or voidable*—*Statute of Limitations.*] An eleemosynary corporation is within the meaning and operation of 13 Eliz. c. 10. —A lease, of land belonging to such a corporation, not in conformity with the provisions of the third section of that statute, is therefore absolutely void. —The governors of *Magdalen Hospital* (created a corporation, for certain charitable purposes, by the 9 Geo. 3, c. 31) made, in 1783, a lease of certain land of the hospital for ninety-nine years, at the rent of "one peppercorn (if lawfully demanded)." The only covenants, on the part of the lessee, were to indemnify the governors from all taxes, &c., during the term, and to surrender the premises at its end; and, on the part of the governors, for quiet enjoyment. No act had been done until now to avoid the lease, or to interfere with the persons holding the land. In July, 1876, the governors brought an action in Chancery to recover possession of the land thus leased:—*Held*, that the lease was absolutely void within the provisions of the statute 13 Eliz. c. 10. That consequently the right of the governors to re-enter on the land existed from the moment of the execution of the lease, and that right not having been sought to be enforced till now, was barred by the *Statute of Limitations*, 3 & 4 Wm. 4, c. 27, s. 2.—*Per* Lord *Selborne*:—If any rent, however small, had been reserved and received, it would have created the legal relation of a tenancy from year to year, and the *Statute of Limitations* could not have run.—*Pennington* v. *Cardale* (3 H. & N. 656) commented on. Magdalen Hospital *v.* Knotts - - - - - - 324

2. —— *Words to create a Trust—Pleading.*] A testator devised his estates to his son and his heirs male "in the fullest trust and confidence" that he would not do, nor permit to be done, "any act in law or otherwise" to defeat the thereinafter declared trusts and limitations of the estates, but that, on the contrary, he would do all in his power to effectuate them. He then declared how the estates were to go if the son died without issue of his body lawfully begotten, specifically devising one-fourth portion to *D.* The son having entered into possession of the devised estates, suffered a recovery:—*Held*, that the words of the will did not create a trust, and that the entail was barred by the recovery.—*Per* Lord *Penzance:* The right of a tenant in tail to enlarge his estate into a fee cannot be restricted by any expressions of a testator, the donor of the estate.—*D.* claimed, under a will executed in 1779, a certain estate, and the mesne profits accruing from the date when his father's title under that will first arose. The statement of claim itself set forth dates which shewed his grandfather's title to have first arisen in 1840, and his father's title, on the death of the grandfather, in 1852. His father died in 1864, and he alleged that he himself first knew of his own title in February, 1875. He asserted the existence of an express trust under the will. The Defendant put in a demurrer alleging that "the statement of claim was bad in law," denying that there was a trust so as to defeat the estates limited over on the death of the first tenant in tail without issue male, and it concluded with these words, "and on other grounds sufficient in law to sustain this demurrer":—*Held*, that this last sentence was sufficient to raise the defence of the *Statute of Limitations.*—There is a distinction between the *Statute of Limitations* and the *Statute of Frauds.* The latter must be pleaded. The title to the estate, not the mere right to proceed for its recovery, is affected by the former. If the Plaintiff's statement of claim shews, on the face of it, that the time within which a title to land must be asserted has gone by, the defence of the *Statute of Limitations* may be raised on demurrer.—That defence was so raised without any distinct reference to the statute itself, and was *held* to be sufficient. Dawkins *v.* Lord Penrhyn - 51

MALICIOUS PROSECUTION—Railway company Authority to prosecute - - 270
See New South Wales, Law of. 2.

MANAGER OF BANK—Malicious prosecution—Authority to prosecute - - 270
See New South Wales, Law of. 2.

MARGINAL NOTE—Will - - 96
See Scotch Law. 16.

MARINE INSURANCE - - - 755
See Insurance.

MINE—Compensation for damage - - 115
See Damages.

—— Slate quarry—Waste—Lessee - 454
See Waste.

MINERALS—Right of Crown—*Isle of Man*—Customary estate - - - 294
See Isle of Man, Law of.

MORTGAGE—Insolvent mortgagor—Law of *Victoria* - - - - 156
See Victoria, Law of. 2.

—— Mortgagee in possession—Liability of 391
See Victoria, Law of. 1.

—— Redemption—Bill impeaching the mortgage
See Victoria, Law of. 1. [391

NEGLIGENCE—Contributory—Collision - 669
See Ship.

NEW SOUTH WALES, LAW OF—*Nuisance in the Highway—Special Damage—Whether Municipality liable for Non-repair of Roads and Drains—New South Wales Acts, No.* 13 *of* 1858 *and No.* 12 *of* 1867.] The municipality of *B.*, incorporated under *New South Wales* Acts No. 13 of 1858 and No. 12 of 1867, and having thereunder the care, construction, and management of the roads and streets within their municipality, constructed therein a barrel drain into which ran an open drain, the brickwork of which having broken away, and not having been repaired, a hole was caused, into which the Plaintiff's horse fell, carrying the Plaintiff with him, crushing the Plaintiff's leg against one side of the hole, and causing a compound fracture of the leg.—In an action claiming damages against the municipality (*a*) for negligence in constructing the street, (*b*) for negligence in keeping and maintaining the street, and not repairing the drain, gutter, or sewer in the said street (plea, the general issue) the Chief Justice directed the jury that the Defendants under their Act of incorporation were not liable for the result of any mere nonfeasance; that if they thought fit to construct a sewer, and did the work in so negligent a manner as to bring about the accident, they were liable for that misfeasance; but if they constructed the sewer properly in the first instance and it became defective afterwards they were not bound to repair it; and further, that if the defective state in which the drain was arose from the operation of the weather or wear and tear, it having been properly constructed originally, they were not liable. Verdict for Defendants:—*Held*, on motion for a new trial, that as regards (*b*) there was misdirection. The barrel drain was not only made by the Defendants, but the sole control and management of it were by the statute vested in them. By reason of their construction of that drain and their neglect to repair it, whereby, as an indirect but natural consequence the dangerous hole was formed, which was left open and unfenced, they caused a nuisance in the highway for which, whatever their statutory obligation to repair may have been, they were liable to an indictment, and also to an action by the Plaintiff who had sustained direct and particular damage from their breach of duty. Borough of Bathurst *v.* Macpherson [256

2. —— *Principal and Agent—Authority of Bank Manager to prosecute on behalf of Bank must be proved, not presumed—Liability of Bank for Malicious Prosecution by its Manager—Appealable Sum includes Adjudged Interest on a Verdict.*] **NEW SOUTH WALES, LAW OF**—*continued.* Although costs may not be added to the amount recovered in estimating the appealable sum, yet interest on a verdict, given by statute, payable from the time of obtaining such verdict until the time of entering up the judgment appealed from, and included in such judgment, is to be considered in estimating such appealable sum.—In an action for a malicious prosecution against an incorporated banking company the jury found that the same had been authorized on behalf of the bank by *W.*, the acting manager, and were directed by the Judge that it was to be inferred from *W.'s* position as manager that he had sufficient power under the circumstances for directing a prosecution.—A rule *nisi* to enter a nonsuit or for new trial was discharged:—*Held*, on appeal, that assuming the prosecution to have been authorized by *W.*, the direction to the jury to the effect that it was to be inferred from *W.'s* position that he had authority to direct the prosecution was on the evidence incorrect.—The arrest, and still less the prosecution of offenders, is not within the ordinary routine of banking business, and therefore not within the ordinary scope of a bank manager's authority. Evidence accordingly is required to shew that such arrest or prosecution is within the scope of the duties and class of acts such manager is authorized to perform. That authority may be general, or it may be special and derived from the exigency of the particular occasion on which it is exercised. In the former case it is enough to shew commonly that the agent was acting in what he did on behalf of the principal; but in the latter case evidence must be given of a state of facts which shews that such exigency is present, or from which it might reasonably be supposed to be present.—Rule made absolute for a new trial. Bank of New South Wales *v.* Owston - - - - 270

NEXT OF KIN—Time of ascertaining - 448
See Will. 2.

NOTICE OF OBJECTION—Extension of letters patent - - - - 171
See Patent. 1.

NUISANCE—Highway—Law of *New South Wales*
See New South Wales, Law of. 1. [256

OFFICIAL ASSIGNEE—Insolvency—Law of *Victoria* - - - - - 156
See Victoria, Law of. 2.

OPERA—Musical score—Copyright - 711
See Copyright.

PARTIAL LOSS—Ship—Insurance - - 755
See Insurance.

PARTIES—Appeal—Landed Estates Court, *Ireland* - - - - - 737
See Landed Estates Court.

PARTNERSHIP—*Joint and Separate Liability on one Contract—Res judicata—Law—Equity—Judicature Act.*] There is no settled rule of Equity that a contract which is in terms joint, and would be so construed at Law, is to be treated in Equity as joint and several.—An action, and a judgment against two persons who had borrowed money from the Plaintiffs (though the judgment is unsatisfied), constitute a bar to another action brought by the

PARTNERSHIP—*continued.*
same Plaintiffs against a third person, who is afterwards discovered to have been really interested, as a partner, with the two debtors in the business for the purposes of which the money had been borrowed. (*King* v. *Hoare* (13 M. & W. 494) adopted. *Diss.* Lord *Penzance.*) — This result did not depend on the doctrine of election. — *Semble, per* Earl *Cairns*, L.C.: — If the case was considered as one of agent and undisclosed principal there could be no doubt about it. — *K.* had, under a written arrangement between self and *W. & M.*, made large advances to them in respect of certain speculations in iron. *W. & M.* fell into difficulties. *K.* brought an action against them to recover the debt, and obtained judgment. This judgment remained unsatisfied. *W. & M.*, who resided in *Scotland*, became bankrupt there, and *K.* put in his claim under the Scotch sequestration, and recovered a small dividend. *K.* then discovered that *H.* had been associated as a partner in the speculations in iron, and brought an action against him as having been jointly liable with *W. & M.* in respect of the advances :—*Held*, that the action against *H.* was not maintainable, the contract having passed into a judgment. *Diss.* Lord *Penzance*, on the ground that the objection to *K.'s* title to recover was merely one of technical procedure at Law, and that since the *Judicature Act*, 1873, the rule of Equity had, as to such a matter, superseded the rule of Law, and the rule in Equity admitted of this proceeding against *H.* the newly discovered partner.—The expression that partnership debts were treated in Equity as joint and several explained. Kendall *v.* Hamilton - - - - - - - 504

—— Share in company in the name of partners—Scotch banking company - - 632
See Scotch Law. 11.

PATENT—*Admissibility of Evidence—Notice of Objections—Rule* 6 *passed under* 5 *&* 6 *Will.* 4, *c.* 83.] It is sufficient, prior to tendering evidence of instances of anticipation, to state the grounds of objection to the extension of letters patent without stating all the particulars of those objections. *In re* Ball's Patent - - 171

2. —— *Non-user of Invention—Presumption of Inutility rebutted—Public Policy—Condition of Prolongation.*] In all cases where the utility of a patent has not been tested by actual employment the question to be considered is, whether the evidence is sufficient to rebut the presumption arising from its non-use that the invention is one of no practical utility.—Application for a prolongation of the term granted after strong and unanswered evidence of utility, though the patent had not been used in *England* during the whole term. On grounds of public policy the condition was annexed that the Government and all contractors employed by the Government should be at liberty to use the invention. *In re* Hughes' Patent - - - - - - 174

PERMANENT INJURY—Damages for - 115
See Damages.

PLEADING—Statute of Limitations - 51
See Limitations, Statute of. 2.

POLICY OF INSURANCE—Broker's lien 1
See Principal and Agent.

POOR RATE—*Limit of Rateability—Not destroyed except by express Enactment or very strong Inference.*] Where a privilege has been granted by an Act of Parliament, it cannot be taken away without a direct repeal of that Act, or inference from another so strong of intention to take it away, as to authorize a Court to say that the two Acts cannot stand together. — Certain Local Government Acts appointed Improvement Commissioners for sanitary purposes over a district which lay partly within and partly without the borough of *Walsall*. The Commissioners had power to levy rates to defray the expenses they were bound to incur. The rate on any railway within the Commissioners' district was, by a local Act of 1848, to be limited to one-fourth of the rateable value of the railway. A part of a line of railway did run through the Commissioners' district, and was so rated under the local Act up to 1872. By the *Public Health Act*, 1872, Urban Authorities were constituted, and the mayor, aldermen, and burgesses of the borough, in Town Council, became an urban authority, for, among others, sanitary purposes in the borough. Both bodies, the Commissioners and the Town Council, were given powers to make rates to defray the expenses incurred by them in the discharge of their respective duties. In the grant, to the town council of rating powers, nothing was said with regard to any limit of rating upon any particular kind of property. By the *Public Health Act*, 1875, the Town Council was invested with powers to assess a rate to defray the expenses incurred for sanitary purposes, and the powers of a local board were transferred to it as the Urban Authority; and it was provided that expenses incurred by the Urban Authority, if the Council of a Borough, were to be defrayed out of the Borough fund, but if by the Improvement Commissioners were to be defrayed out of the district rate. One section continued the limit of the Act of 1848 as to rating railway property. By a local Act of 1876 the limits of the borough were greatly extended, and the mayor, &c., of the borough became the Sanitary Authority for the extended borough. The Act of 1848 was repealed, with the exception of certain sections. Among the excepted sections that one which limited the amount of rateability of railways was not mentioned, but nothing was said specifically to put an end to that limited liability :—*Held*, upon the true construction of the various Acts, public and local, that there having been no express revocation of the privilege granted in respect of rating the railway at only one-fourth of its rateable value, a borough rate calculated on its full rateable value could not be maintained. Overseers of Walsall *v.* London and North Western Railway Company - - 467

—— Validity of—Case stated by sessions—Jurisdiction - - - - 30
See Sessions.

POSSESSORY ACTION—Canadian law - 135
See Canada, Law of.

POWER—Of appointment—Succession duty 427
See Succession Duty.

PRACTICE—*Costs — Revivor — Executor.*] An order, under the modern practice, allowing an executor to continue the proceedings in an action instituted by his testator, which order has been

PRACTICE—*continued.*
obtained by him after a judgment in favour of his testator, and after notice of an appeal against that judgment, is equivalent to the old order for revivor, and subjects him to the same liabilities. He becomes in effect a substantive party to the suit, and is personally liable to costs. Boynton *v.* Boynton - - - - - 733

PREDECESSOR - - - - 427
See Succession Duty.

PRESUMPTION—Inutility of patent - 174
See Patent. 2.

—— Property in foreshore - - - 770
See Scotch Law. 14.

—— Right to flow of water - - 121
See Water.

PRINCIPAL AND AGENT—*Policy on Ship—Broker's Lien on.*] The lien of a broker upon policies of insurance which he has effected, and on which he has paid the premiums, may be superseded by a special arrangement or contract, or by his particular mode of dealing with the parties for whom he has effected them. But where he has merely agreed to state monthly accounts and to receive monthly payments, but has never delivered up the policies until after actual payment made to him, his general right of lien is not superseded in any way by this special arrangement. And this is so though he has effected the policies through an intermediary, whom he knew to be an intermediary and not the principal, and who has received payment from the principal, but who has not paid the broker. Fisher *v.* Smith - - - - - 1

—— Prosecution by railway company—Authority of manager - - - - 270
See New South Wales, Law of. 2.

PRIVILEGED COMMUNICATION — Representation in course of business - - 247
See Defamation.

PROLONGATION OF PATENT - 171, 174
See Patent. 1, 2.

PUBLIC OFFENCE — Implied representation — Private injury - - - - 13
See False Representation.

PUBLIC POLICY—Prolongation of patent 174
See Patent. 2.

—— Restraint of trade - - - 674
See Restraint of Trade.

PUBLICATION — Musical composition — Copyright - - - - - 711
See Copyright.

QUARRY—Power to open—Lessee - - 454
See Waste.

QUARTER SESSIONS - - - 30
See Sessions.

RAILWAY—*Toll—"Per Ton per Mile"—Construction of Acts imposing Tolls — Costs where Judges divided in Opinion.*] A company obtained an Act (8 & 9 Vict. c. clxix.), authorizing it to construct a railway and to demand tolls for the conveyance of possengers and goods thereon. The

RAILWAY—*continued.*
charge for the conveyance of goods was generally thus expressed, "per ton per mile not exceeding,"' &c. One clause provided that "for articles or persons conveyed on the railway for a less distance than four miles" there might be, "in addition to the prescribed tolls for conveyance, a reasonable charge for the expense of stopping, loading, and unloading." No publication of this charge in the form of "a toll" had been made upon the toll board:—*Held*, that this "charge" for stopping was not properly a "toll," and that the non-publication of it on the toll-board in the form required by the *Railways Clauses Consolidation Act*, 1845, ss. 93 and 95, did not prevent the company from demanding it. The judgment of the Court below was on this point affirmed.—The 105th clause granted tolls for "a fraction of a mile beyond four miles," &c.; the company claimed such tolls when the whole distance traversed was less than four miles. The Court of Appeal, consisting of Lords Justices *James*, *Mellish*, and *Baggallay*, had been divided in opinion on this point; Lords Justices *James* and *Baggallay* holding that on the true construction of the words in the clauses of the Act such a charge was justifiable, Lord Justice *Mellish* holding that it could not be made. On appeal to this House there was again a division of opinion.—Earl *Cairns*, L.C., and Lord *Selborne* were of opinion that the charge was, on the whole, warranted by the words of the Act, and that the judgment of the Court below must on this point also be affirmed.—Lord *Penzance* and Lord *O'Hagan*, applying the principle that no charge could be imposed on the public but by the clearly expressed intention of the Legislature, *held* that in this case the Legislature had not clearly expressed an intention, nor had intended, to authorize such a charge.—The judgment of the Court below stood affirmed. No costs were given.—Reasons for not giving costs in such a case, as suggested in *Anderson* v. *Morice* (1 App. Cas. 713, at p. 750) explained. Pryce *v.* Monmouthshire Canal and Railway Companies - - 197

—— Poor-rate - - - - 467
See Poor-rate.

RATEABLE OCCUPATION - - - 467
See Poor-rate.

REDEMPTION OF CASUALTIES—Scotch Law
See Scotch Law. 15. [87

REGISTRATION—Copyright—Opera score 711
See Copyright.

—— Shareholders—Refusal to register—Scotch banking company - - - 624
See Scotch Law. 9.

—— Trade-marks - - - - 479
See Trade-mark.

—— *Victoria* Land Transfer Act - - 391
See Victoria, Law of. 1.

REPAIR OF HIGHWAY—Liability of municipality—*New South Wales* - - 256
See New South Wales, Law of. 1.

REPRESENTATION—Implied - - 13
See False Representation.

—— Made *bonâ fide* in course of business - 247
See Defamation.

RES JUDICATA—*Scotch Sequestration*—19 & 20 *Vict. c.* 79—*Bankruptcy* (*Scotland*).] For the purpose of having a contract of sale of a concession set aside on the ground of fraud, and repayment of the purchase-money, £65,000, with interest, a company filed a bill of complaint in the English Court of Chancery.—At the same time they lodged a claim to be ranked, for the same sum, upon the estates of a firm carrying on business in *Edinburgh* and *London*, which had been sequestrated in *Scotland*. In the claim, the company described the debt as owing under the circumstances set out at length in the bill in Chancery "produced and held as repeated *brevitatis causâ*." To the Chancery suit the trustee of the sequestrated estates was a party. The trustee having rejected the claim, the Lord Ordinary ordered a condescendence and proof. The proof was adduced on the 16th of June, 1874. The Court of Session, and ultimately, this House, held that the claimants were not entitled to the debt claimed against the sequestrated estates; and refused to sist the proceedings in the sequestration, pending the issue of the Chancery suit (1 App. Cas. 780).—The bill in Chancery as filed alleged certain *indicia* of fraud; afterwards additional evidence of fraud was discovered, in time to have it inserted by way of amendment. The bill was finally amended on the 3rd of March, 1874. Subsequently a decree was made by the Vice-Chancellor, and affirmed by the Court of Appeal, rescinding the contract, and ordering repayment of the £65,000; and a declaration was added, that the plaintiff company should be at liberty to prove in the sequestration suit in *Scotland* for the £65,000 (5 Ch. D. 394).—Founding on this decree the company lodged another claim with the trustee in *Scotland*. Again the trustee rejected the claim; and again a condescendence was made up. The company this time put their claim upon the allegations contained in the bill in Chancery as finally amended on the 3rd of March, 1874. The trustee relied on the plea of *res judicata*:—*Held* (affirming the decision of the Court below), that the plea of *res judicata* prevailed, because (1) the new allegations of fraud in the amended bill in Chancery did not constitute a new *medium concludendi*; (2) the alleged facts were within the knowledge of the claimants before the proof was adduced in the former action, and might have been inserted by amendment in their closed record in *Scotland*.—*Held*, also, that no question arose as the validity, or examinability, of a foreign judgment.—*Per* Earl *Cairns*, L.C.: A party who has been unsuccessful cannot be allowed to reopen the litigation merely by saying, since the former litigation there is another fact, going exactly in the same direction with the facts stated before, and leading up to the same relief asked for before, but it being in addition to those facts, it ought now to be allowed to be the foundation of a new litigation, and he should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say—I will shew you that this is a fact which entirely changes the aspect of the case, and further I will shew you that it was not and could not by reasonable diligence be obtained by me before. PHOSPHATE SEWAGE COMPANY *v.* MOLLESON 801

RES JUDICATA—*continued.*

—— Action against one joint contractor - 505
See PARTNERSHIP.

RESCISSION OF CONTRACT—Contract to take shares - - - - 615
See SCOTCH LAW. 10.

RESIDUARY LEGATEE—Legacy to - 96
See SCOTCH LAW. 16.

RESIGNATION OF TRUSTEE—Shareholder—Scotch banking company - 567, 598
See SCOTCH LAW. 3, 6.

RESTRAINT OF TRADE—*Reasonableness of the Restraint—Arbitration Clause—Award not a Condition Precedent to Right of Action.*] Agreements in restraint of trade are against public policy and void, unless the restraint they impose is partial only, and reasonable in relation to the objects of the contract; and also unless they are made upon a real and *bonâ fide* consideration.—Where the object of an agreement is to parcel out the stevedoring business of a particular port amongst the parties to it, and so to prevent competition, at least amongst themselves, and also, it may be, to keep up the price to be paid for the work:—*Held*, that such agreement is not invalid if carried into effect by provisions reasonably necessary for the purpose, though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade.—A provision that if a particular merchant named in the agreement should refuse to allow the stevedoring of any ship to be done by the party entitled to it under the agreement, and should require one of the other parties to do it, such party so required should give an equivalent to the party who lost the stevedoring, is not unreasonable either as regards the party entitled or as regards the merchant.—But a provision that in the case of ships passing out of the hands of merchants named in the contract into the hands of other merchants, who should not choose to employ the party entitled under the agreement, all the parties thereto are deprived of the work, cannot be justified. It is obviously detrimental to the public, is entirely beyond anything the legitimate interests of the parties required, and is utterly unprofitable and unnecessary, at least for any purpose which can be avowed.—A clause which stipulates that all matters in difference which should arise touching the agreement should be submitted to arbitration, and prohibits any action being brought in respect of the matters actually submitted to arbitration, is a collateral and independent agreement, and an award thereunder is not a condition precedent to such action, except as regards such sums as under the agreement are not payable until the amount thereof has been ascertained by such award. COLLINS *v.* LOCKE - - - - 674

REVIVOR—Costs—Executor - - 733
See PRACTICE.

REVOCATION—Declaration of trust—Right of third party - - - - 228
See SCOTCH LAW. 13.

—— Will—Construction - - - 70
See WILL. 1.

RIVER—Navigable—Right to foreshore - 770
See SCOTCH LAW. 14.

SAILING RULES—Rule 18 - - - 669
See Ship.

SALE OF GOODS—Implied representation - 13
See False Representation.

SCOTCH LAW — *Charity Funds — Mixture of Funds.*] In 1695 a truster settled, in connection with *Trinity Hospital, Edinburgh*—a charity for the support of indigent and sick persons—a sum of money secured on bonds. The interest in perpetuity was to be employed in the maintenance in the hospital of twelve poor persons; the preference to be given (1) to those of the truster's kindred; (2) to those of his name; and (3) if these did not apply then to indigent persons generally. He appointed as the patrons the lord provost and town council of *Edinburgh*, and the ministers of the burgh present and to come. The lord provost, magistrates and town council were governors of the hospital, and got control of the fund in 1700, and administered it as if part of the general charity funds of the hospital, mixing the interest with the general income of the hospital, and from the mixed income defrayed the expenses which they incurred for the whole charity, without making any distinction in the accounts.—The bonds of the settled sum were paid up in 1744 and 1753, and were subsequently, with other charity moneys, lent to the city of *Edinburgh*; and on them a great loss occurred.—Other funds of the hospital had been invested in land in 1734, and that land had increased greatly in value. The ministers of the burgh never took any part in the administration of the fund. In a question whether the settled fund, on being ordered to be separated, was to participate in the present increased value of lands purchased since 1700; and whether the ministers had now a right to be joined in the administration:—*Held*, affirming the decision of the Court below, that (1) the fund had been so inextricably mixed with the general charity funds, that it must be taken to have participated proportionally in the increased value of the hospital funds, and that in valuing the aggregate funds all lands purchased since 1700 must be valued and taken into account; (2) that notwithstanding the length of time during which a contrary practice had prevailed, the ministers should be joint administrators. Lord Provost, &c., of Edinburgh *v.* Lord Advocate - - 823

2. —— *Company—Banking Company—Winding-up—Personal Liability of Trustees—Construction of Contract—Companies Act*, 1862 (25 & 26 *Vict. c.* 89).] *A.* and *B.*, trustees for *C.* and *D.*, accepted, as part of a trust estate, stock in a Scotch banking company. By the deed of co-partnership, there was to be no limit whatever to the shareholders' liability. They signed the deed of transfer "as trust disponees," and accepted the stock "as trust disponees aforesaid, subject to the articles and regulations of the said company in the same manner as if they had subscribed the contract of co-partnership. Their names and addresses were entered in the stock ledger (the register of shareholders), followed by the words "as trust disponees" for *C.* and *D.* The individual names of *A.* and *B.* did not appear in any list of shareholders issued to the public.—The bank suspended payment with immense liability. The liquidators placed *A.* and *B.* on the first part of their list of contributories as liable to calls "in their own right." In a petition to rectify the list of contributories, by transferring the names of *A.* and *B.* from the first part to that part entitled "second part—contributories as being representatives of others":—*Held*, affirming the decision of the Court below, that the trustees, *A.* and *B.*, were partners of the company, and as such were personally liable for payment of all calls made on them in respect of the said stock.—*Held*, also, that a distinction between partners, with limited and unlimited liability, was repugnant to the whole nature of the deed of partnership.—*Lumsden* v. *Buchanan* (4 Macq. 950; Court Sess. Cas. 3rd Series, vol. ii. p. 723), undistinguishable.—*Per* Earl *Cairns*, L.C.: The words "as trust disponees" were added to the names of the trustees to mark the stock as property of the particular trust; to shew that the stock was held on a joint account with a right of survivorship; and possibly with a third purpose—to give a peculiar facility under the law of *Scotland* to a trustee to retire from the trust.—*Per* Lord *Penzance*: Where trustees join in a contract of partnership for trading purposes, the mere designation of them as trustees will not exempt them from the same personal liability as is undertaken by the other shareholders.—*Per* Lord *Blackburn*: Trustees, not created by a statute, are not by the law of *Scotland* a body of corporate or a *quasi* corporation. Muir *v.* City of Glasgow Bank - - - 337

3. —— *Company—Banking Company—Winding-up—Resignation of Office by Trustee after Stoppage of Company—24 & 25 Vict. c.* 84, *s.* 1—30 & 31 *Vict. c.* 97, *s.* 10—*Companies Act*, 1862, *s.* 35.] If directors in the fair and *bonâ fide* exercise of their powers under the company's contract, as managers of the company, and in circumstances which make it a reasonable act of management, resolve not to record future transfers which may seriously affect and alter the liability of the partners, the resolution will be effectual, and the directors in declining to record the transfers cannot be held to be in default within the meaning of sect. 35 of the *Companies Act*, 1862.—Before the commencement of the winding-up, but after the stoppage, and after the publishing of a notice by the directors calling a special general meeting of the shareholders of the *City of Glasgow Bank*, for the purpose of passing a resolution to have the bank wound up by reason of its irretrievable insolvency; and after a resolution by the directors that they would not record any future transfers, one of four trustees whose names appeared as such on the bank register resigned his office of trusteeship under 24 & 25 Vict. c. 84, s. 1, with the consent of his co-trustees and the beneficiaries. A notarial copy of the resignation was sent the next day to the bank, but the directors refused to alter the register by affixing a note, or in any other way:—*Held*, affirming the decision of the Court below, that the resignation was too late to exempt the trustee from personal liability.—*Per* Earl *Cairns*, L.C.: The trustee's resignation of his trusteeship alone would not terminate his liability. He ceased to be a trustee; but it remained for him to terminate his liability in respect of the bank by a transfer, or something

SCOTCH LAW—*continued.*

equivalent to a transfer, of his shares.—*Per* Lord *Selborne*: After the issuing to the shareholders and the public of a circular calling a meeting, with a view to the necessary resolution for a voluntary winding-up, it is too late for any shareholder to part with his shares, either to the copartnership itself or to any other person. *In re* City of Glasgow Bank. Mitchell's Case 567

4. —— *Company—Banking Company—Winding-up—Resignation of Trustees—Assuming of Beneficiaries as Trustees—Proceedings subsequent to notorious Insolvency of Company—Commencement of Winding-up.*] In 1873 the names of four trustees were entered on the register of the *City of Glasgow Bank* as members. On the 2nd of October, 1878, the bank stopped payment. On the 5th of October the directors issued a summons convening a general meeting of the shareholders to pass a resolution for voluntary winding-up. On the 18th of October the original trustees assumed new trustees; resigned their office of trust; and executed a transfer. The directors refused to alter the register:—*Held*, affirming the decision of the Court below, that the original trustees were personally liable, their resignation being too late. —*Alexander Mitchell's Case* (4 App. Cas. 567) followed. *In re* City of Glasgow Bank. Rutherfurd's Case - - - - - 581

5. —— *Company—Banking Company—Winding-up — Unlimited Liability — Trustee — Companies Act*, 1862, *ss.* 25, 78, 154, 196—*Transfer of Shares—Note of Assumption of New Trustees on Stock Ledger.*] In 1850 shares in the *City of Glasgow Bank*, which was a company registered, but not formed under the *Companies Act*, 1862, were transferred into the names of *A.* and three others as trustees and executors of a deceased truster. *A.* signed mandates to the bank authorizing the payment of dividends, sanctioned the purchase of additional bank stock, and signed the minutes of meetings of the trustees. On the voluntary winding-up of the company:—*Held*, affirming the decision of the Court below, that *A.* was rightly put on the list of contributories.—Two surviving original trustees executed a deed assuming new trustees. Both new and old trustees passed an unanimous resolution to have stock standing in the names of the original trustees in the *City of Glasgow Bank* transferred into the names of the original and assumed trustees. A note of assumption, giving the names of all the assumed trustees, was made by the bank officials on the stock ledger following the account of the original trustees. All the trustees signed a minute of a meeting of the trustees, which stated that "Mr. *Lang* (one of them) tabled the scrip of the bank stock shewing that the same had been transferred into the names of all the trustees original and assumed as directed at the previous meeting." At the winding-up of the company the names of the assumed trustees were placed on the list of contributories. In a petition for rectification:—*Held*, affirming the decision of the Court below, that the assumed trustees, except one, a female trustee, who had been a minor, and unmarried at the date of the resolution to transfer, were properly on the list of contributories; and declared as to the sometime minor, that her

SCOTCH LAW—*continued.*

name should *in hoc statu* be removed from the list, without prejudice to the right of the liquidators to place thereon the names of her husband and herself in her right. *In re* City of Glasgow Bank. Bell's Case - - - - - 550

6. —— *Company—Banking Company—Winding-up—Marriage Settlement—Transfer of Stock signed by Trustees—Dividend Warrant—Acting as Trustee—Non-intimation to Company of Resignation of Office.*] In 1855 stock in the *City of Glasgow Bank* was transferred to trustees by an nnte-nuptial contract of marriage. The law agent made a declaration of the contents of the deed, and notified it to the bank, who placed all the names of the trustees on the register of shareholders, as trustees. The marriage contract was not signed by any of the trustees; but they all subscribed subsequently a transfer of railway stock from the wife as executrix of one *Bogle* to themselves; and in this transfer they were described as "trustees nominated under and by virtue of the said ante-nuptial contract of marriage." In 1856 *A.*, one of the trustees, signed a dividend warrant; and shortly afterwards he left the neighbourhood. On the death of the husband in 1868, it being necessary to expede confirmation to his estate, *A.* refused to act any longer, and sent to the law agent a formal letter declining his office of trustee, it was accepted by the other trustees, but not regularly intimated to, or acted upon, by the bank. *A.'s* name remained on the register until the stoppage of the bank on the 2nd of October, 1878:—*Held*, affirming the decision of the Court below, that *A.'s* name was rightly on the list of contributories, his acceptance of the trust being clearly established by his actings, extending over a long period of years; and that his resignation had not the effect of exempting him from personal liability. *In re* City of Glasgow Bank. Ker's Case - - 593

7. —— *Company—Banking Company—Winding-up—Trustee entered on Register as Executor—Acting as Shareholder for over twenty years—Personal Liability*—30 & 31 *Vict. c.* 97, *s.* 10.] A truster under his settlement appointed three persons *A.*, *B.*, and *C.*, as his trustees, who were also to be his sole executors with his heritable and moveable estate, which included *City of Glasgow Bank* stock. *C.* died and the truster executed a codicil appointing *D.* as trustee, and with the same powers as *A.* and *B.* The truster having died in 1854, *A.*, *B.*, and *D.* accepted the trust; were confirmed executors, and were entered on the bank register as executors for the stock. *D.* sometimes signed the dividend warrants as "trustee," and once as "sole surviving trustee and executor." The bank suspended payment on the 2nd of October, 1878, and on the 22nd of October *D.* resigned his office of trustee;—*Held*, affirming the decision of the Court below, that *D.* was personally liable, on the ground that more than twenty years before he had authorized the stock to be transferred into his name, and had ever since acted as a shareholder.—*Held*, also, the resignation was of no effect to escape liability. —*Per* Earl *Cairns*, L.C.: An executor whose testator has held shares in a joint stock company has generally one of two courses open to him.

SCOTCH LAW—*continued.*

He may have the shares transferred into his own name, and become to all intents and purposes a partner in the company. He may, on the other hand, not wish to have the shares transferred into his name, and he ought in that case to have a reasonable time allowed him to sell the shares, and to produce a purchaser who will take a transfer of them.—In any case where the bank transfers the shares into the name of the truster's executor, this House would require to be satisfied that the transfer had been authorized by a distinct and intelligent request on the part of the executor.—*Per* Lord *Selborne:* The case of trustees who take a transfer of shares in their names differs, in principle, from that of executors, who merely intimate their title as executors to a company, in order to claim and exercise the rights which belong to them as the legal representatives of their testator. . . . Trustees have not, in any proper sense of the word, a representative character, but executors have. . . . Having representative rights, it is impossible that they should not be entitled to produce the legal evidence of them to the company, for the purpose of having their title in some way recorded and recognised, without making themselves personally liable. *In re* City of Glasgow Bank. Buchan's Case **583**

8. —— *Company—Banking Company—Winding-up—Approval of Purchase of Stock by Trustee—Antecedent Authority to place Name on Register followed by subsequent Recognition—Liability in solidum, not pro ratâ parte only.*] *A.*, one of five trustees appointed under a marriage contract, signed with his co-trustees a note approving the purchase of stock in a joint stock banking company of unlimited liability. By the authority of the law agent of the trustees, acting on the note of approval, all the names of the trustees appeared in the transfers as accepting the stock, and in the register of members of the company. *A.* did not sign the transfers, but he signed a subsequent letter to the company authorizing the payment of dividends. The company was wound up, and *A.* and his co-trustees were placed on the list of contributories as personally and individually liable for calls. In a petition at the instance of *A.* for rectification of the register and list of contributories:—*Held*, affirming the decision of the Court below, that *A.* had authorized his name to be placed on the register. That the trustees were liable *in solidum* for the whole of the stock, and not *pro ratâ parte* for one-fifth part only.—*Andrew Buchanan's Case* in *Lumsden* v. *Buchanan* (4 Macq. 950; Court Sess. Cas. 3rd Series, vol. iii. p. 89) explained. See Lord *Selborne's* opinion. Cuninghame *v.* City of Glasgow Bank - **607**

9. —— *Company—Banking Company—Winding-up—Refusal to register Sale of Stock after known Insolvency—Companies Act*, 1862, *s.* 35—*Sale of Stock—Registered Proprietor not set forth—Statute* 30 *Vict. c.* 29 (*Leeman's Act*).] On the 28th and 30th of September, 1878, a shareholder in a joint stock banking company sold, through his broker in the usual course of business, on the *Glasgow* stock exchange, his shares for settling-day, the 16th of October. The name of the person in whose name the stock stood in the books of the company was not made known to the purchasers, nor were the shares marked by numbers, but the holders on the day of sale sent contract notes intimating the sale and purchase to their respective principals. On the 2nd of October the company suspended payment, and the directors knew that its insolvency was irretrievable. On the 5th of October an extraordinary meeting of the company's shareholders was summoned by circular for the 22nd, to pass a resolution to wind up the company voluntarily, on account of its insolvency. On the 11th of October the seller was informed that the company had been the purchasers, they having the power to purchase their own stock by their articles of co-partnership. On the 15th of October the company refused to prepare a transfer of the stock to themselves; and on the 18th they refused to register a unilateral deed of transfer which was delivered to them by a notary public. On the 19th the shareholder presented a petition for rectification of the bank's register by the deletion of his name therefrom. On the 22nd of October the extraordinary resolution to wind up voluntarily was passed. The liquidators placed the shareholder's name on the list of contributories. In a question under sect. 35 of the *Companies Act*, 1862:—*Held*, affirming the decision of the Court below, that it would have been improper for the directors under the circumstances to have registered the transfer on the 16th of October, and therefore that the shareholder's name was rightly included in the list of contributories.—*Held*, also, that it was unnecessary in this case to decide whether the contract of sale was null and void under the provisions of 30 Vict. c. 29. Mitchell *v.* City of Glasgow Bank - - - - - - **624**

10. —— *Company — Banking Company — Winding-up—Stoppage—Action to rescind Contract on the Ground of Fraud—Commencement of Winding-up—Companies Act*, 1862, *ss.* 18, 38, 84, 130.] Since 1873 *A.* had appeared on the register of a joint stock banking company as the holder of £6000 of stock. On the 2nd of October, 1878, the bank stopped payment. On the 5th of October the directors issued circulars summoning an extraordinary general meeting to pass a resolution to wind up the company. On the 18th of October a report made by independent investigators was sent to all the shareholders, which shewed that the insolvency of the company was of such an overwhelming character that large calls would have to be made to meet its liabilities. On the 21st of October *A.* raised an action for reduction of his contract to take stock, on the ground that he was induced to purchase by the fraudulent misrepresentation of the directors. The summons in this action was served on the company on the same day. On the 22nd of October an extraordinary resolution to wind up the company voluntarily was passed. *A.* was put on the list of contributories. In a petition by *A.* for rectification of the register and list of contributories based on the action of the 21st of October:—*Held*, affirming the decision of the Court below, that the rights of innocent third parties had intervened; and that *A.'s* action for reduction of his contract was too late to exempt him from liability. Tennent *v.* City of Glasgow Bank - - - **615**

SCOTCH LAW—*continued.*

11. —— *Company — Banking Company — —Winding-up—Stock in the Names of Partners for themselves "and the Survivor for behoof of the Firm"—Trustees—Joint and several Liability.*] For some years previous to 1878 *A.* and *B.* had carried on in partnership the business of law agents in *Edinburgh*. By contract of co-partnership, executed in August and October, 1878, *A.* and *B.*, on the narrative that the former partnership had ceased, agreed to continue the same, and to assume *C.* as a partner on the terms, *inter alia*, that the new firm should continue under the firm name of *A.* and *B.*; that the bank account should be kept in the name of the firm; and that *A.* and *B.* should supply the necessary capital required in equal proportions, either by holding bank stock in the name of the firm, or by advancing the requisite funds. Prior to the execution of this contract, but with a view to the arrangements of the new firm, £1000 of stock of the *City of Glasgow Bank*, an unlimited joint stock company, was purchased by *A.* and *B.* who supplied the price in equal proportions. A transfer was taken in favour of *A. & B.*, "and the survivor of them for behoof of the firm" of *A. & B.* A similar entry appeared in the register of members.—*C.* was not aware of the terms of the contract, or a party to the transfer. The bank stopped payment, and the liquidators placed *A.* and *B.* individually on the list of contributories as holders of £1000 of stock as "trustee for the firm" of *A. & B.* In an application *inter alia* to vary the list by deleting the words "trustee for the firm" and to place *A.* and *B.* on the list as contributories each for a separate sum of £500:—*Held*, affirming the decision of the Court below, that a trust was created for the benefit of the partnership, and that as trustees *A.* and *B.* were jointly and severally liable for all calls in respect of the £1000 of stock. Gillespie *v.* City of Glasgow Bank - 632

12. —— *Company — Banking Company — Winding-up—Purchase by Company of its own Shares in the Names of Trustees—Trustees liable—Companies Act*, 1862, *ss.* 35, 38, 98.] One of the articles of association of a Scotch joint-stock limited company enacted that "No transfer of any shares of the company's stock, either upon a sale, or in consequence of the bankruptcy or insolvency of any shareholder, or in consequence of the marriage of any female shareholder, shall be valid or effectual without the consent of a majority of the other shareholders expressed in writing; but in the event of the other shareholders declining to consent to any such proposed transfer of shares in the company, they shall be bound to take such shares at the price offered in the case of a proposed sale, and at the market price of the day in the case of a proposed transfer for any other cause." Added subsequently by special resolution: "Unless such shares shall not at the time be fully paid up, and the reason for declining to consent be that the directors are not satisfied with the proposed transferee."—Trustees entered upon the register were anxious in the discharge of their duty to dispose of their trust shares, which consisted of 100 £100 shares, fifty being fully paid up, and fifty on which £1 per share had been paid. After negotiations, the four directors by special minute

SCOTCH LAW—*continued.*

approved of the purchase by three of themselves of these shares to be held in trust for the company. A transfer was executed in favour of the three directors "in trust for the company;" and their names were entered upon the register of members with the same designation. The money paid for the shares came out of the funds of the company; and thereafter the selling trustees ceased to be treated as having any interest therein. At the next general meeting the purchase was approved of by a majority of the shareholders. There was no other transfer or transferees proposed. More than fifteen months after the transaction the company was wound up voluntarily, and calls were necessary to pay creditors. In an application by the liquidator substantially for rectification of the register, by substituting the names of the selling trustees for those of the three directors; it being admitted that all parties had acted with perfect good faith:—*Held*, affirming the decision of the Court below, that the names of the three persons—the three directors—now appearing upon the register as holding these shares could not be disturbed; the transfer to them being valid and effectual, and the rights of creditors having intervened.—*Held*, also, dissenting from the opinion of the majority of the Court below, that the above article of association did not give any power to the company to become the purchaser of its own shares, nor had the transaction been carried on under its provisions.—*Oakes* v. *Turquand* (Law Rep. 2 H. L. 325) and *Muir* v. *City of Glasgow Bank* (4 App. Cas. 337) followed.—*Per* Earl *Cairns*, L.C.: The directors held out to the world that these shares were owned by individuals, and to this the individuals assented. Beyond this creditors had no occasion to look, and they would be entitled to assume that whatever amount of liability attached to the shares was assumed by the individuals in whose name they stood, and that this liability was not in any way diminished by reference to the trust on which they were held. Cree *v.* Somervail - 648

13. —— *Entail—Agreement to disentail—Declaration of Trusts—Power of Revocation—Jus quæsitum tertio.*] A father, being desirous to disentail his estate, procured the consent of the next heir, his eldest son. The minute of agreement between them provided that the father should pay absolutely to the son £4000; and secondly, should pay to trustees the further sum of £3000, for the benefit of the son; it being open to the father to limit the power and control of the son over the said £3000, to such extent, and in such manner, as he should think proper; "and in particular," to direct the trustees to hold it for the son's behoof "in life-rent only, and for the issue of his body in fee, whom failing, to his nearest heirs and assignees."—Three months afterwards, a bond was executed by the father as security for the £3000, in favour of the trustees "and for the ends, uses, and purposes expressed in a declaration of trusts," of even date therewith. The deed of declaration restricted the son's interest to an alimentary life-rent; and failing his issue, the fee was given to his aunt and her children. The son declared his acquiescence in the bond, and declaration of trusts, which were subsequently delivered to the trustees,

SCOTCH LAW—*continued.*

who paid the income of the £3000 to the son.—After the father's death, the son married; and subsequently died, survived by his widow, but without issue. He left a deed by which he revoked the destination in the declaration of trusts in favour of his aunt and her children, and bequeathed the £3000 to his widow:—*Held*, affirming the decision of the Court below, that the deed of revocation was effectual, the destination in favour of the aunt and her children being purely of a testamentary nature; and that no *jus quæsitum tertio* had been created.—*Per* Lord *Selborne:* The son could not possibly be bound by any erroneous interpretation which the trust deed might have put upon the original contract, so as to substantially vary its operation and effect, either on the principle of estoppel, or any other, unless there were some new bargain, or new consideration. Wightman *v.* Costine - 228

14. —— *Foreshore—Tidal River—Prescription—Barony.*] Parties holding barony titles to lands situated on both sides of the *Clyde*, a navigable tidal river, claimed, as against the Crown and the *Clyde* Navigation trustees, that the foreshores *ex adverso* their lands belonged in property to them, subject to such rights of navigation or other rights which the public and the *Clyde* trustees might have over the same. The barony titles contained no express grant of foreshore, nor did they contain any specific boundaries which could be held to include the foreshore. The parties rested their claim on the grounds (1) that the barony titles alone gave them the property; (2) that coupled with their titles they had exercised from time immemorial acts of possession over the foreshore:—*Held*, affirming the decision of the Court below, that the acts of possession for the prescriptive period having been proved, and following on barony title to lands so situated, they constituted a right of property in the foreshore.—*Held*, also, that in this case it was not necessary to decide the question whether a barony title to lands so situated, which does not specify the exact boundary of the lands or contain any express grant of foreshore, could alone give a right of property in the foreshore.—See Lord *Blackburn's* opinion (p. 791), as to the weight of each act of possession, as evidence.—*Agnew* v. *Lord Advocate* (Court Sess. Cas. 3rd Series, vol. xi. p. 309) commented on. Lord Advocate *v.* Lord Blantyre - - 770

15. —— *Superior and Vassal—Subdivision of Feu—Redemption of Casualties—Conveyancing (Scotland) Act*, 1874, *ss.* 4, 15.] Where part of a feu has been alienated, the casualties of superiority incident to that part may be redeemed separately under the power given by *The Conveyancing (Scotland) Act*, 1874 [37 & 38 Vict. c. 94], s. 15, and the casualties applicable to the *entire* feu need not be redeemed.—The superiors of a feu created before the passing of the Act refused to execute a discharge of the casualties incident to a part alienated after the Act, unless the vassal paid the highest casualty applicable to the *entire* feu:—*Held*, affirming the decision of the Court below, that the vassal was entitled to obtain redemption of the casualties, on payment of one year's rent effeiring to his part of the feu, with an addition of 50 per cent. Magistrates of Edinburgh *v.*

SCOTCH LAW—*continued.*

Edinburgh Roperie and Sail Cloth Company - - - - - - 87

16. —— *Trust—Settlement—Legacy to Residuary Legatee held good—Intention of Testator—Interest on Legacies payable out of Price of Heritable Estate—Legacy Duty—Effect of Marginal Note, "All free of Legacy Duty."*] A testator gave to *R. K.* £2000 and "to each of his brothers £1000," and bequeathed the residue of his estate between Sir *T. K.* and *R. B.* Sir *T. K.* was the eldest brother of *R. K.*, who was the third among eight:—*Held*, reversing the decision of the Court below, that Sir *T. K.* was entitled to the legacy of £1000 as one of the brothers of *R. K.* in addition to half the residue. Trustees were directed to sell heritable estates as soon after the testator's decease as practicable, and pay certain legacies. After a necessary litigation running over two years, the property was realised. On a question whether interest was payable from the testator's death, in accordance with the general rule in *Scotland*, or from the date of the sale:—*Held*, reversing the decision of the Court below, that interest was due on the legacies from the testator's death. In his holograph will, a testator wrote along the margin opposite to legacies to servants these words, "All free of legacy duty." There was no circumflex or mark to shew where they were intended to be read:—*Held*, reversing the decision of the Court below, that all the legacies given in the will, both those to relatives and those to servants, were free of legacy duty. Kirkpatrick *v.* Bedford. Bedford *v.* Kirkpatrick - 96

SESSIONS—*Rate—Jurisdiction of Queen's Bench—Appeal.*] The jurisdiction of the Queen's Bench upon questions relating to the validity of parochial rates is not purely consultative but judicial, and the decisions of that Court upon such matters are therefore open to appeal.—A decision of the Queen's Bench on such a matter, though given in the form of discharging a rule for quashing an order of sessions, is an "Order" within the 19th section of the *Judicature Act*, 1873, and is therefore subject to appeal. Overseers of the Poor of Walsall *v.* London and North Western Railway Company - - 30

SEQUESTRATION — Scotch — English Chancery suit - - - - - 801

See Res Judicata.

SHIP—*Collision—18th Rule—Contributory Negligence.*] It is dangerous to the public to leave to masters of vessels a discretion as to obeying or departing from the sailing rules; and accordingly such a discretion need not be exercised except in cases of very clear necessity.—Where a collision has occurred owing to one colliding vessel having failed to observe (as its duty was) the rule of the road, by keeping out of the way, *held* that in the absence of proof as to the particular time at which an intention to violate that rule was clearly manifest, the other colliding vessel, being *primâ facie* bound to observe the 18th rule by keeping on its course, would not have been justified in departing therefrom.—*The Commerce* (3 W. Rob. 287) commented upon. The 'William Frederick.' The 'Byfoged Christensen' - - - 669

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SUCCESSION DUTY—"*Predecessor*"—*Tenant in Tail—Donor of Power*—16 & 17 *Vict. c.* 51.] Where a power is created, to be exercised over an estate, the donor of the power, the person out of whose estate a benefit or "succession" is to be derived, is, within the 2nd section of the *Succession Duties Act*, the "predecessor" of the person taking such benefit or "succession."—*St. J.*, a father, tenant for life of an estate, and his eldest son *William*, tenant in tail, re-settle the estate, the son becoming tenant for life, remainder in tail, reserving to themselves a power of appointment, and, in default, giving the power to appoint to the father and *Thomas*, the second son (who is thereby made tenant for life, remainder in tail). *William* died unmarried, and without having appointed, and the father and *Thomas* appoint. The persons taking the succession under such appointment, take it as a succession from *William*, the eldest son, the donor of the power, from whose estate the benefit is derived, and not from the father and *Thomas* the second son, who exercises the power. —The cases of *The Attorney-General* v. *Braybrooke* (9 H. L. C. 150), *The Attorney-General* v. *Floyer* (9 H. L. C. 477), and *The Attorney-General* v. *Smythe* (9 H. L. C. 497) followed.—The case does not fall within the first portion of the 4th section of the statute.—*Per* Lord *Cairns*, L.C.: The words of the 4th section apply to the case of one person possessing a general power to dispose of property as an absolute owner, and not to a power given in a family settlement to a father and son, where one is intended to be a check upon the other in the exercise of the power.—*Per* Lord *Selborne:* The first branch of the 4th section points to an absolute power, practically equivalent to property. A general power in a family settlement, which cannot be exercised without the concurrence of two minds, is not equivalent to a joint property in the two donees.—The case is not to be treated as an alienation within the 15th section of the statute. Charlton *v.* The Attorney-General - - - - - 427

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See Scotch Law. 14.

TOLL—Railway—Publication—Charge for loading—Fraction of mile - - 197
See Railway.

TRADE—Restraint of - - - 674
See Restraint of Trade.

TRADE-MARK—*Committee of Experts—Supervision of the Court*—38 & 39 *Vict. c.* 91—39 & 40 *Vict. c.* 33.] The Committee of Experts at *Manchester*, appointed under the Trade-marks Registration Acts, is not a judicial tribunal. It is appointed to consider and give an opinion on technical matters peculiarly within the knowledge of its members. But a person dissatisfied with the opinion of the committee may move the Court of Chancery to consider it, and that Court is not bound to adopt the opinion as conclusive, even though the Court may have no reason to think that the committee has proceeded on a wrong principle, or has acted in an improper manner.

TRADE-MARK—*continued.*
Great weight is properly to be attributed to the opinion of the committee, but, it proceeds *ex parte*, and the Court may direct a full consideration of the matter before the Registrar himself.—Observations on the manner in which the Court is to exercise this supervising authority. Orr Ewing *v.* Registrar of Trade-marks - - 479

TRANSFER OF SHARES—Unlimited company—Refusal to register—Scotch banking company - - - - 624
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TRUSTEE—Liability—Shareholder in unlimited company—Scotch banking company.
See Scotch Law. 2—12.

UNLIMITED COMPANY — Winding-up—Scotch banking company.
See Scotch Law. 2—12.

VENDOR AND PURCHASER—*Contract—Statute of Frauds—"Title to be approved by our Solicitors."*] Where a Court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration.—Applying this rule, though the first two letters of a correspondence seemed to constitute a complete contract, the House upon the whole of what had passed in letters and conversation, came to the conclusion that no concluded and complete contract had been established.—*Per* Earl *Cairns*, L.C.: *Quære*, whether the addition, in a written document, of the words "subject to the title being approved by our solicitor," could affect a contract for the sale of land, otherwise complete in itself?—*Quære*, whether the proper meaning of such words is more than that the title offered is not to be accepted without investigation, and that objections made on such investigation would be subject to the decision of a legal tribunal:—*Per* Lord *Selborne:* The observation stated in *Jervis* v. *Berridge* (Law Rep. 8 Ch. Ap. at p. 360), that "the *Statute of Frauds* is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties," affirmed. Hussey *v.* Horne-Payne - - - - - 311

VICTORIA, LAW OF—*Mortgagor and Mortgagee—Decree for Redemption where Bill impeached the Mortgage and did not pray to redeem—Liability of Mortgagee in Possession—Costs—Registration—Victoria Transfer of Land Statute, s.* 83 *et seq.*] Although a mortgagor is not entitled to a decree for redemption on a bill which impeaches the mortgage securities and contains no prayer for redemption; yet such rule does not apply where the issues disclosed by the pleadings are not merely mortgage or no mortgage, but whether the Defendant by means of his acts subsequent to the impeached mortgage had ceased to be mortgagee and had become absolute owner, and also whether the mortgagee's advances on the footing of the mortgage had not been more than satisfied

VICTORIA, LAW OF—*continued.*
by his receipts, the bill praying for an account, and offering to allow to the mortgagee all just credits.—A purchase by a mortgagee of mortgaged property, sold either under the power of sale or in execution of a decree against the mortgagor company (obtained collusively between the mortgagee and the directors) does not operate to vest an absolute title in the mortgagee.—Where the mortgagor is registered owner of leasehold estate in *Victoria* (under *Transfer of Land Statute*), and the mortgage is made and registered under sect. 83 and following sections, so that the only way in which the mortgagee can extinguish the rights of the mortgagor is by foreclosure under 31 Vict., No. 317, or sale under sects. 84, 85, and 87 of the *Transfer of Land Statute;* then whether a sale of such leasehold estate is made by the mortgagee under the statutory power of sale, or as absolute owner, no interest therein passes to the purchaser until registration: see ss. 42 and 87.—A mortgagee is accountable, not merely for his actual receipts whilst in possession of the mortgaged property, but also for whatever is received by those to whom he transfers possession under an arrangement inoperative to transfer title, and in derogation of the rights of the mortgagor.—A mortgagee in possession is not chargeable with interest on his receipts if, when he took possession, an arrear of interest was due to him, unless by setting up a title averse to the mortgagor he has lost the immunities of an ordinary mortgagee.—A mortgagee is chargeable with the full value of the mortgaged property sold if, from want of due care and diligence, it has been sold at an under value.—A mortgagee who in a redemption suit sets up and fails to prove an absolute title to the mortgaged property, and is then found to have been, at the date of suit, overpaid as mortgagee, will not only not be allowed his costs of suit but may have costs given against him. National Bank of Australasia *v.* United Hand-in-Hand and Band of Hope Company - - 391

2. —— *Powers of Official Assignee—Release of Equity of Redemption to the Mortgagee—Victorian Insolvency Statute*, 1865—*Corporation bound by Agreement not under Seal.*] A release of an insolvent's equity of redemption to the mortgagee is not *primâ facie* beyond the scope of an official assignee's authority; and sect. 27 of the "*Insolvency Statute* 1865" of *Victoria*, clearly contemplates the exercise of such authority.—Where the consideration for such a release is an agreement not under seal by a corporation (mortgagee) to abstain from proving any portion of its debt, and such agreement has been acted on by accepting the release, *held*, that the corporation is bound thereby, and that the consideration has not failed. Melbourne Banking Corporation *v.* Brougham - - - - - 156

WASTE—*Mines—Quarries—Term of Years—Reversioner.*] A termor of land, with no grant of a power to work quarries on the land, cannot open any in order to work them; but if the quarries have been worked before the commencement of the term, he may continue the working.—The owner of land demised it in 1802, by way of mortgage, for a term of 500 years at a peppercorn rent. A quarry, called the lower quarry, appeared

WASTE—*continued.*

to have been then open on the land, and had been worked by the mortgagor. In 1820, the mortgagee foreclosed the equity of redemption, and took possession of the property, and worked not only the lower quarry, but another, which received the name of the upper quarry. In 1873 the Plaintiff, the reversioner of the term of 500 years, having, not long before, become acquainted with the fact that he was the reversioner, filed a bill to restrain the termor from working the quarries and for an account. At the trial the great dispute of fact was as to the time when the upper quarry had been opened. Vice-Chancellor *Hall* had thought that it was not shewn to have been opened in the time of the mortgagor, and so granted, as to that, an injunction and account. The Court of Appeal came to a different conclusion on the evidence and dismissed the Plaintiff's bill. On appeal to this House the decision of the Court of Appeal was upheld.—Where the lease of a quarry reserves, not the payment of a fixed sum by way of rent, but a share of the profits of the quarry, it is to be treated as opened for purposes of commerce—The consideration of the facts and circumstances of a case must determine on whom the *onus* lies of shewing when a mine or quarry was first opened for working.—A mine or quarry opened by the owner of the inheritance, while he was still in actual possession, even though after the date of the mortgage, will enure for the benefit of the mortgagee.—*Per* Lord *Selborne*: Where a mine or quarry has been opened for a restricted or definite purpose, as to obtain fuel, or the means of repairing a particular tenement on the estate, that would not give a tenant for life, or other owner of an estate impeachable for waste, the right to work it for commercial profit. But when a mine or quarry is once open, so that the owner of an estate impeachable for waste, may work it, the sinking of a new pit on the same vein, or the breaking ground in a new place on the same rock, is not, *necessarily*, the opening of a new mine or a new quarry. Elias *v.* Snowdon Slate Quarries Company - - - - - 454

WATER—*Artificial Watercourse—Right to the Flow of Water—Presumption.*] The right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle. In the former case each successive riparian proprietor is *primâ facie* entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin.—*Wood* v. *Waud* (3 Ex. 748; 18 L. J. (Ex.) 305) approved.—*Held*, in this case that the plaintiff's legal right to the enjoyment of water overflowing from an artificial reservoir through an artificial watercourse on his neighbour's (the defendant's) land should be presumed from the

WATER—*continued.*

circumstances under which the same were presumably created and actually enjoyed; subject to the Defendant's right to the use of the water for the purpose of irrigating his lands by proper and requisite channels and other proper means. Rameshur Pershad Narain Singh *v.* Koonj Behari Pattuk - - - - - 121

WAY—Extinguishment of, under Inclosure Act *See* Inclosure. [221

WILL—*Construction—Revocation of "Clause" in a Will.*] *J. E.* made a will in which he devised his house, lands, and tenements to his mother, "*Elizabeth E.*, her heirs and assigns, for ever;" he afterwards struck his pen through the words, "her heirs and assigns for ever":—*Held*, that this was, under the 6th section of the *Statute of Frauds* (29 Car. 2, c. 3), a valid revocation, by obliteration, of a clause in his will; the mother took only an estate for life.—The 6th section of the statute was satisfied by this act of obliteration of the words in question, which amounted to an actual revocation, and not a mere alteration.—The word "clause" in the first portion of the section may properly be read "part."—*Per* Lord *Penzance*: "Devise" in the statute means a disposition of lands, in writing, and when the statute says the testator may revoke any "clause thereof," it means any intelligible portion of the devise, whether the effect is to increase the beneficial interest of the taker, or the reverse. Swinton *v.* Bailey - - 70

2. —— *Construction—Time for ascertaining "Next of Kin" under the Statute of Distributions.*] A testator, who had four daughters, divided a fund into four equal amounts, giving one to each daughter and her children; but when one died and left no child the interest was to be paid to the others, and after the death of the last survivor the fund was to be divided among her children; "or if there be no such children, that the same be paid to such person or persons as will then be entitled to receive the same as my next of kin under the statute for the distribution of intestates' estates." One of the daughters left issue, the others had no issue. On the death of the last daughter:—*Held*, that under the words of the will the class of "next of kin" described the persons who filled that character at the time of the death of the testator, and not at the death of the last surviving daughter; and that the shares of the daughters who had died without issue were divisible among the persons representing the four daughters.—*Bullock* v. *Downes* (9 H. L. C. 1) followed. Mortimore *v.* Mortimore - - - 448

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